TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 488. ~~247~~ 68

EBER B. WARD, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MICHIGAN.

FILED OCTOBER 20, 1870.

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a UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Michigan, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between the United States, plaintiff, and Eber B. Ward, defendant, a manifest error hath happened, to the great damage of the said Eber B. Ward, defendant, as by his complaint appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the fifth day of December, A. D. 1870, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done
b therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the third day of June, 1870.

ADDISON MANDELL, *Clerk.*

Allowed by—

JNO. W. LONGYEAR,
District Judge.

The United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the fifth day of December, A. D. 1870, pursuant to a writ of error filed in the clerk's office of the circuit court for the eastern district of Michigan, wherein Eber B. Ward is plaintiff in error, and the United States is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

c Witness the Honorable John W. Longyear, judge of the circuit court of the United States for the eastern district of Michigan, this third day of June, A. D. 1870.

JNO. W. LONGYEAR,
District Judge.

To A. B. MAYNARD, Esq., *U. S. Dist. Att'y.*

EASTERN DISTRICT OF MICHIGAN, *ss:*

On this eighth day of June, A. D. 1870, personally appeared John W. MacGrath, before me, the subscriber, Addison Mandell, clerk of the circuit court of the United States for the eastern district of Michigan, and makes oath that he delivered a true copy of the within citation to Aaron B. Maynard, esq., United States district attorney for the eastern district of Michigan, on the third day of June, A. D. 1870.

ADDISON MANDELL,
Clerk of the Circuit Court of the U. S. for the Eastern District of Michigan.

(Indorsed:) In the Supreme Court of the United States. Eber B. Ward, plaintiff in error, vs. The United States, defendant in error. Writ of error, citation, and proof of service. Filed in clerk's office, June 3d, 1870. A. Mandell, clerk. C. I. Walker, att'y for plaintiff in error.

1 Pleas before the judges of the circuit court of the United States for the sixth circuit and eastern district of Michigan, at the district court-room in the city of Detroit, of the term of March, in the year of our Lord one thousand eight hundred and seventy, in the case wherein—

THE UNITED STATES OF AMERICA ARE plaintiffs,
and
EBER B. WRAD IS DEFENDANT.

Be it remembered that on the tenth day of March, in the year of our Lord one thousand eight hundred and sixty-four, the said plaintiffs, by Alfred Russell, United States district attorney, their attorney, came into the court aforesaid, before the judges thereof, and filed their declaration against the said defendant; which said declaration is in the words and figures following, to wit:

UNITED STATES OF AMERICA:

The circuit court of the United States for the seventh circuit & eastern district of Michigan, of the March term, A. D. 1864, to wit, March the seventh, in the year one thousand eight hundred and sixty-four.

2 EASTERN DISTRICT OF MICHIGAN, *ss:*

The United States of America, plaintiffs in this suit, by Alfred Russell, their attorney, filing this their declaration as commencement of suit, complain of Eber B. Ward, who is a citizen of the State of Michigan, of a plea of trespass on the case upon promises.

For that whereas heretofore, to wit, on the first day of March, A. D. 1864, the said defendant was indebted to the said plaintiffs in the sum of forty-five thousand dollars, lawful money of the United States of America, for so much money before that time had and received to and for the use of the said plaintiffs, and being so indebted, he, the said defendant, afterwards, to wit, on the day and year last aforesaid, at Detroit, in said district, undertook and then and there faithfully promised the said plaintiffs to pay them the said last-mentioned sum of money upon request; yet the said defendant, though often requested, hath disregarded his promises, and hath not paid to the said plaintiffs any of the said monies or any part thereof, to the plaintiffs' damage of ninety thousand dollars, and thereupon they bring suit, by

ALFRED RUSSELL,
Attorney of the United States for the Eastern District of Michigan.

3 Upon the filing of which said declaration the following rule was entered:

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vs.
EBER B. WARD.

On filing declaration in this cause as commencement of suit, and on

motion of Alfred Russell, attorney for the said plaintiffs, ordered that said defendants do appear and plead to said declaration within thirty days after being served with a copy thereof and notice of the entry of this rule or judgment.

ALFRED RUSSELL,
U. S. Att'y, Pl'ffs' Att'y.

EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that on the 7th day of April, A. D. 1864, I served the within declaration on Eber B. Ward, the defendant within named, by delivering to him personally at Detroit, in said district, a true copy thereof, with like notice of rule to plead endorsed thereon as is hereon endorsed.

(Signed) CHA'S DICKEY, *U. S. Marshal,*
By C. T. DICKEY, *Dep.*

4 To which said declaration the said defendant, by Charles I. Walker, his attorney, on the thirtieth day of April of said year eighteen hundred and sixty-four, filed in said court his plea, in the words and figures following, to wit:

The circuit court of the United States for the eastern district of Michigan.

THE UNITED STATES OF AMERICA }
vs. }
EBER B. WARD. }

And the said Eber B. Ward, defendant in this suit, by C. I. Walker, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him; and of this he puts himself upon the country. And the said plaintiff doth the like, &c.

C. I. WALKER,
Att'y for Def't.

5. Therefore to try the issue above joined, let a jury come thereof by whom, &c., who neither, &c., because as well the said plaintiffs as the said defendant have put themselves on that jury.

And the jurors of that jury of whom mention is made, to wit, Peter Dow, Abel Patchin, Peter Provencal, Morgan L. Gage, Seth Goodwin, Garry Spencer, Donald L. McDonell, Daniel H. Clark, Abel F. Butterfield, Benjamin Page, Alvenza Hunt, and Ephraim Hardy, who were on the sixteenth day of June, A. D. 1864, elected, tried, and sworn to try the issue joined in this case, and after hearing the arguments of counsel and receiving the charge of the court, retired to their room to consult of their verdict under the charge of Peter K. Morris, the officer sworn to attend them; and after being a short time absent, return into court and say they find said defendant did undertake and promise in manner and form as the said plaintiffs have in their declaration alleged against him, and they the jury assess the said plaintiffs' damages on occasion thereof at the sum of twenty-two thousand five hundred and forty-one dollars and ninety-eight cents, ($22,541 98.)

It is therefore considered by the court now here that the said plaintiffs do recover of the said defendant, Eber B. Ward, the sum
6 of twenty-two thousand five hundred and forty-one dollars and

ninety-eight cents, damages assessed as aforesaid by the jury aforesaid in form aforesaid, together with said plaintiffs' costs of suit to be taxed, &c.

Afterwards, to wit, on the eighteenth day of June, in the year eighteen hundred and sixty-four, as yet of the June term of said court, on motion of defendant, by Mr. Pond, his attorney, ordered by the court that execution on the judgment entered on the seventeenth June instant in this case be stayed for the period of forty-two days from said seventeenth June instant, to give time to file a motion or petition for a new trial.

Afterwards, to wit, on the thirtieth day of said June, in said year eighteen hundred and sixty-four, leave was granted by the district judge to said defendant to file a petition for a new trial.

Afterwards, to wit, on the seventh day of June, in the year one thousand eight hundred and sixty-five, the motion for a new trial upon said petition was argued by C. I. Walker, esq., on behalf of said defendant, and by Alfred Russell, esq., on behalf of the plaintiffs, and submitted for decision.

7 And thereupon afterwards, to wit, on the eighth day of said June, in the year one thousand eight hundred and sixty-five, the court aforesaid, before the judges thereof, having considered the petition of the defendant for a new trial, together with the arguments of counsel had thereon, ordered that the judgment and verdict of the jury heretofore rendered in this case be, and the same are now, by the court set aside, and a new trial granted in this cause.

Thereupon to try the issue above joined let a new jury come thereof, by whom, &c., to recognize, &c., because as well the said plaintiffs as the said defendant have put themselves upon that jury.

And the jurors of that jury, of whom mention is made, to wit, Anson Andrews, Joseph Jelch, William Moore, Alonzo T. Ray, Seymour Finney, Samuel S. Bangs, Joseph Loranger, Augustus S. Johnson, Isaac Hayward, Nathaniel I. Daniels, Abraham C. Fiske, and Joshua R. Kelsey, who were on the eighth day of June, in the year eighteen hundred and sixty-six, elected, tried, and sworn well and truly to try the issue

8 joined between the parties aforesaid, and after hearing the evidence adduced and the arguments of counsel on either side, and after receiving the charge of the court, retire to consult of their verdict under the charge of Charles T. Dickey, an officer duly sworn to attend them, and after being some time absent, return into court and say they cannot agree upon a verdict, whereupon they are discharged from further consideration of the case.

Thereupon to try the issue above joined let a new jury come thereof, by whom, &c., to recognize, &c., because as well the said plaintiffs as the said defendant have put themselves upon that jury.

And thereupon the said cause is continued between the parties aforesaid from term to term of said court, until the term of November, in the year one thousand eight hundred and sixty-nine; and now, to wit, on the second day of November of said term of November, in the said year one thousand eight hundred and sixty-nine, came the parties aforesaid by their respective attorneys into the court aforesaid before the judges thereof now here.

And the jurors of that jury, of whom mention is last made, to
9 wit, Isaac N. Hathaway, Richard Osborn, John H. Jones, Levi W. Lee, Samuel Acker, Henry Hurst, Nelson D. Skeels, William Stoddard, A. J. Hunter, Sylvester Brown, Charles Spoor, and David Sharrer, who were elected, tried, and sworn to try the issue joined in this case between the parties aforesaid, and after hearing the evidence adduced and the arguments of counsel, and receiving the charge of the court, retired to consult of their verdict, to wit, on the fifth day of said November, of the term of November aforesaid, under the charge of David D. Marshall, the officer sworn to attend them, and after being a long time absent, return into court and say that they find that said defendant did undertake and promise in manner and form as the said plaintiffs have in their declaration alleged against him, and they the jury assess said plaintiffs' damages against defendant on occasion thereof of the sum of sixty-three thousand and ninety dollars and fifty cents, ($63,090 50.)

Afterwards, to wit, on the 28th day of February, in the year one thousand eight hundred and seventy, as yet of the November term as aforesaid of said court, on motion of said defendant, by Mr. Pond, his
10 counsel, the court now here grant twenty days further time in which to take and file a bill of exceptions in this case.

And now on this day, to wit, the twenty-fourth day of May, in the year one thousand eight hundred and seventy, it is considered by the court now here that the said plaintiffs do recover of the said defendant, Eber B. Ward, the sum of sixty-three thousand and ninety dollars and fifty cents for their damages assessed by the jury as aforesaid, in form aforesaid, together with interest thereon, from said fifth day of November, A. D. eighteen hundred and sixty-nine, the time of the rendition of said verdict as aforesaid, together with the sum of sixty-seven dollars and ninety-six cents for the costs and charges of the said plaintiffs by them about their suit in this behalf laid out and expended.

11 In the circuit court of the United States for the eastern district of Michigan.

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Afterwards, to wit, at a session of the circuit court of the United States for the eastern district of Michigan, held at the United States circuit court-room in the city of Detroit, in and for said eastern district of Michigan, on the 5th day of November, A. D. 1869, before Honorable Ross Wilkins, judge of the circuit court of the eastern district of Michigan, the aforesaid issue so joined between the said parties as aforesaid came on to be tried by a jury of said district, summoned to serve in said circuit court and duly empannelled, good and lawful men of said district, on which day there came as well the district attorney for and on behalf of the said plaintiff, as the said defendant, by his attorneys.

And the jurors of the jury aforesaid empannelled to try the said issue being called, also came and were then and there in due manner chosen and sworn to try the same issue.

And upon the trial of that issue the counsel for the said plaintiff, to maintain and prove the said issue on their part, gave in evidence the

following stipulation entered into between the counsel for the plaintiff and the counsel for defendant:

12 In the circuit court of the United States for the eastern district of Michigan.

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It is stipulated by the counsel for the defendant that the following statements are facts and that the same may be admitted in evidence upon the trial of this cause upon the part of said plaintiff, subject to objection for want of competency and relevancy.

That in April, 1863, the plaintiffs were the holders of twenty-four rewarehousing bonds duly executed under seal, in the usual form, by the Detroit and Milwaukie Railway Company, a body corporate and politic under the laws of the State of Michigan, as principal, and that the signature and seal of said defendant was attached to 19 of said bonds as surety, together with other sureties, which said bonds were duly delivered.

That a correct abstract of said bonds is given at the end of this stipulation, and that said such bonds were executed and delivered to the plaintiffs in the year 1856, 1857, and 1858, and that the condition of each of said bonds recited that if the above-bounden Detroit and Milwaukie Railway Company, Eber B. Ward, (and others,) or either of them, or either of their legal representatives, should, on or before the ex-
13 piration of three years, to be computed from the day of the original importation of the goods, wares, and merchandise enumerated therein, well and truly pay, or cause to be paid, into the collector of customs for the port of Detroit, (a sum named,) the amount of duty to be ascertained as due and owing on goods, wares, and merchandise entered the day for warehouses by the Detroit and Milwaukie Railway Company, consisting of a quantity of railway iron, (naming the weight,) or shall, on or before the expiration of the three years aforesaid, in the mode prescribed by law, withdraw the said goods and wares and merchandise from the warehouse at the port of Detroit, then their obligation to be void, otherwise in full force and virtue, and that the iron rails named in said bonds were laid upon the track of said company.

That in said April, 1863, the said plaintiffs claimed that there was due and unpaid upon said bonds about the sum of ninety-four thousand dollars, without interest, and that the Detroit and Milwaukie Railroad Company, hereinafter named, and said defendant, admitted that there was unpaid upon said bonds the sum of about ($76,000) seventy-six thousand dollars, without interest, which difference was caused by a dispute as to whether in respect of the iron in bond when the tariff law of 1857 was passed the duty of 30 per cent. existing at the time of the execution of the bonds, or the duty of 24 per cent., created by
14 that law, should be collected.

That on the first day of January, A. D. 1858, the said principal obligor, the railway company, executed a mortgage upon its track, franchises, and other property to Brydges, Reynolds and Beecher as trustees, for $750,000 as collateral to 150 $5,000 bonds, and shortly after another mortgage to the same parties for 500 $1,000 bonds, said two mortgages being commonly called the third and fourth mortgages.

On the tenth day of February, one thousand eight hundred and fifty-

nine, an act of the legislature of Michigan was approved and took effect entitled "An act in relation to mortgages against preferred stock in delivery of goods by railway companies," by the first section of which it was in substance provided that upon the foreclosure of any mortgage or pledge of the property and franchises of any railway corporation, if the railway, its track, and appurtenances were sold, at the sale thereunder, if the purchaser or purchasers should do and perform certain things therein specified, and, among others, transfer to said corporation its railway track and appurtenances, and all and singular the equipments necessary to run the same, the said corporation should be at liberty to
15 issue, and themselves hold, new stock in said corporation, and when said stock should have been issued the holders thereof were authorized to elect officers for said corporation, who should duly qualify for the same as by the charter required, whereupon the old officers of said company should be superceded and the old stock in said corporation should be deemed forfeited, and might be cancelled on the books of said corporation, should in the law be deemed and taken to be the stockholders and officers of said corporation, the charter and all laws appertaining thereto continuing to be the charter and laws regulating and governing said corporation, except that it might be known and called, and sue and be sued and contract by another name, to be chosen and designated in the manner prescribed in said act. And it was further provided that the said corporation should not be liable for any debt or obligation, except those by it thereafter contracted.

That shortly after said act was passed, and on April 7, 1860, the said mortgagees of the above-bounden railroad company filed their bill in this court on the chancery side to foreclose the two mortgages aforesaid, and that such proceedings were had thereon that a decree of foreclosure and sale was made, and a sale took place, and at said sale
16 said Reynolds, one of the complainants, and William Gray, complainants' solicitor, were purchasers, paying for the property in the said mortgage bonds to the amount of about one million of dollars; all of which appears by the files and entries in said cause, and which may be used by either party as evidence in said cause so far as the same are relevant.

That said purchasers proceeded to organize a new corporation under said statute, by the name of the Detroit and Milwaukie Railroad Company, issued stock to the various stockholders, elected officers, took possession of & controlled all the property of said above-bounden railway company, including its track and said iron rails thereon.

That on the 15th day of November, A. D. 1861, Thomas Reynolds, the vice-president, and C. C. Trowbridge, the secretary of said railroad company thus newly organized, executed a trust mortgage, a printed copy of which is hereunto annexed and made a part of this stipulation, and which may be used as testimony in this cause as far as the same is pertinent and relevant thereto.

That in October 1859, and as said bonds thereinafter fell due, the collector and Solicitor of the Treasury directed suit; that no suit was commenced, but that payments were made from time to time by the railway company, under an agreement of extension, made by the Solicitor,
17 up to October 21st, 1860, the date of the organization of railroad company, and that thereafter the said railroad company paid $6,000 generally on said bonds, $3,000 on November the 10th, and $3,000 on December 1st, 1860.

That in said April, 1863, the board of directors of said railroad company was applied to by the defendant verbally to make the proposition

of compromise of said bonds, which was put in writing by the president on the 14th day of May, as follows:

Copy.

"DETROIT AND MILWAUKEE R. R. CO.,
"*Detroit, May 14th*, 1863.

"Captain E. B. WARD.

"MY DEAR SIR: Referring to the consideration we have had on the subject of the duty bonds due the United States, I am authorized to say that if you can procure the settlement and cancelling of them for a sum not exceeding eighty thousand dollars currency, that sum to include your services and any claim you may have against the company on account of those bonds, this company is ready to pay and will pay that sum, one-half on your making the arrangement with the government, and the other half within thirty days thereafter. This offer, however, not to be considered as waiving any defence the company has to said bonds and claims.

"Yours, truly,

"C. C. TROWBRIDGE, *President.*"

18 And that subsequently, in April, said board did verbally make the said defendant the said proposition.

That prior to this time the attorney for the Detroit and Milwaukie Railroad Company had called upon plaintiff's attorney and had conversed with him as to a compromise of the plaintiff's claim on the said bonds, and had suggested the difficulties the plaintiff would have in collecting the same, and the serious doubts whether any recovery could be had thereon, and intimated that he was disposed to advise the company to offer the plaintiff about $20,000.

That in said April, and after his interview with the directors of said railroad company aforesaid, the defendant called upon plaintiff's attorney and stated that he had been urging the directors to do something in relation to said bonds; that he thought they were going to have some money that could be applied to this purpose, and that they would do something in relation thereto. Defendant then made an offer to pay to plaintiff $35,000 in full for said bonds, saying that whether the railroad company did or did not furnish any money, as he expected they would, he would pay that sum out of his own funds, and saying that the company was apt to be behind when money was to be paid out.

19 That he also stated to the plaintiff's attorney that H. H. Emmons, the attorney for the Detroit and Milwaukie Railroad Company, had given an opinion that said bonds could not be collected, and had proposed to offer $20,000 for a compromise and settlement of the same, and to stand trial thereon if such offer was not accepted; that defendant also gave to said plaintiff's attorney some of the reasons why it was claimed that said bonds could not be collected. He stated that it claimed that the railroad company, by virtue of the statute and proceedings thereunder, were not liable upon said bonds, and that even if liable it was unable to pay the same; that at the time the defendant signed said bonds the plaintiffs had themselves, through their officers, given possession of said iron to said Detroit and Milwaukie Railroad Company, and had thereby lost their lien thereon, and the sureties were not liable on said bonds, that said iron had been scattered upon different parts of said railroad, was incapable of identification, and some portion of same had been re-rolled; that the original principal of said bonds had been discharged under and by virtue of said statute and fore-

closure proceedings, and that such discharge, together with such extension of time given to the principal for the payment of said duties
20 without the consent of the sureties, discharged said sureties, and that the defendant was the only responsible and solvent surety upon said bonds.

That then the defendant requested plaintiff's attorney to communicate the said offer to the proper department at Washington.

That the plaintiff's attorney, on the 13th day of May, 1863, communicated to the Solicitor of the Treasury the offer of $35,000, with the grounds of defence alleged by the defendant and said company, and in view of the doubtful questions of law and fact involved recommended the acceptance; that the said attorney had then no knowledge of the existence or provisions of said mortgage of November 15th, 1860; also, that neither the said defendant or the said Trowbridge ever informed the said plaintiff's attorney or any officer of the plaintiffs of the above $80,000 proposition, made by the railroad verbally in April and reduced to writing May 14th, and that neither said attorney nor any officer of the plaintiffs had any knowledge thereof when said recommendation was made or when said claims was compromised, as hereafter stated.

That in the month of July, 1863, the defendants requested the plaintiff's attorney to let him take said bonds, and that said attorney told said defendant that the Secretary of the Treasury had not yet determined to accept the offer recommended, and that he had no au-
21 thority to part with the possession of said bonds; but if the defendant would deposit with the attorney the amount offered in pledge for the return of the bonds, when demanded by the attorney, the same to be paid into the treasury of the United States, if the Secretary should accept the compromise, which said attorney thought most likely he would consent; that the defendant, on July 24th, 1863, deposited the money and took the bonds, the same being in no way cancelled, and agreed to return them if asked for.

That on the 25th day of July, 1863, the defendant delivered the said bonds in no way cancelled to the railroad company, without the knowledge or consent of said attorney, and received from said railroad company eighty thousand dollars, sixty thousand in cash and twenty thousand in a short draft, which was paid; that said defendant did not inform said railroad company or any of its officers of the offer which he had communicated to the plaintiff's attorneys; that said defendant gave the said company the following letter and receipt at the same time, which transaction was unknown to said attornies:

"DETROIT, *July 25th*, 1863.

"W. C. STEVENS, Esq.,

"*Secretary Detroit and Milwaukie Railroad Company:*

"DEAR SIR: I hand you herewith the bonds of the Detroit
22 and Milwaukie Railroad Company given to the United States for duties on iron, 24 in number, and as per list herewith amounting to $134,959 66, less payments that have been made thereon from time to time, which bonds I have paid by compromise with the United States authorities, and for which you have now repaid me according to the agreement made with your company in the settlement of this account with me. I hereby acknowledge that it discharges all claims I have had or have made against the Detroit and Milwaukie Railroad Company on any account whatever.

"I am, dear sir, yours, faithfully,

"E. B. WARD.

"The Detroit and Milwaukee Railroad Company to E. B. Ward, Dr;

1863, July 25th.—For settlement by compromise with the United States government of bonds given by the Detroit and Milwaukie Railway Company for duties on iron, and in full settlement and discharge of all claims & demands of whatsoever nature I have had or made against the Detroit and Milwaukie Company..... .....$80,000 00
Amount as agreed to between Captain Ward and the company.

W. C. STEPHENS, *Sec't'y.*

23 "I hereby certify that the above account, amounting to $80,000 00, is correct, has not been previously certified, and should be paid.

"Dated July 25th, 1863.

"W. C. STEPHENS, *Head of Dep't.*

"$80,000 00.

"Received of the Detroit and Milwaukie Railroad Company the sum of $80,000 00, in full of above account.

"E. B. WARD.

"Dated Detroit, 25 July, 1863."

That on the 20th day of July, 1863, the Solicitor of the Treasury recommended the compromise of said bonds at $35,000, and on the 29th day of July the Secretary of the Treasury compromised said claim on said bonds at said sum of $35,000, whereupon the plaintiff's attorney paid said sum into the treasury, and officially notified the railroad company and sureties of the compromise.

That the claim alleged by the defendant against the railroad company and referred to in said writing of the 14th May, was asserted under the following resolution of the railway company passed in 1857:

Resolved, That the company will pay to any person or persons who will furnish the security required, and carry on the bonds, at the
24 rate of $10,000 per annum, as commission for said service, and to secure said persons will farther execute to a trustee an agreement authorizing and directing the treasurer of this company to pay the said trustees from month to month the net earnings of said road, namely, the earnings after deducting the running and managing expenses, to be held by said trustee and applyment by him to the payment of said duty bonds, and that they place in the hands of said trustee, in addition to said agreement, $200,000, in the ten per cent. income bonds of this company as further security.

That on the 9th day of August, 1860, and after the filing of said bill of foreclosure, an award was made concerning the defendant's claim, under the resolution of 1857, of which the following is a copy:

We, the undersigned, arbitrators, chosen by the Detroit and Milwaukie Railway Company to award and determine what sums are due to the sureties upon certain bonds to the government of the United States, and which sums or commissions are claimed by virtue of the former resolution of the board of directors passed anterior to the election of the present officers of said company, and by which resolutions the in-
25 come of said road was pledged as security for the bondsmen now claiming said commissions, and which said bondsmen now claim the right to have appropriated day by day for their benefit. And we, having examined said resolutions and the proceedings of said corpora-

tion in relation to such claims, and having heard all the proofs and allegations which said parties have wished to produce, and it appearing that the after-mentioned N. P. Stewart and Eber B. Ward, esq's, have executed to the government of the United States a bond for one hundred thousand dollars, in addition to the said bonds by them executed, we do determine and award that there is due to Nelson P. Stewart, esq., the sum of ($16,000,) sixteen thousand dollars; to Eber B. Ward, esq., the sum of sixteen thousand dollars, $16,000.

And, although the following claim has not been urged before us, no one appearing to prosecute the same, we further award and determine that it appears from the facts before us that the suretyship of Cha's J. Brydges, esq., and Thomas Reynolds, esq., is covered by said resolutions and proceedings, and that they are, under the same, jointly, legally, and equitably entitled to the sum of twelve hundred and fifty dollars each.

26 One thousand dollars of the several amounts hereby awarded to each Messrs. Stewart and Ward is in consideration of the liability assumed by them upon the aforesaid warehouse bonds for one hundred thousand dollars, but this award is not intended to affect the rights of said sureties against said railroad company on account of having signed said bonds other than their claims to commissions to this date.

This award signed and published this seventeenth day of August, A. D. one thousand eight hundred and sixty.

ELISHA C. LITCHFIELD. [L. S.]
J. OWEN. [L. S.]

That in February 1864, upon the plaintiff's attorney becoming acquainted with what had passed between said defendant and said company, and especially with the existence of said $80,000 proposition, said attorney served upon said defendant a notice, of which the following is a copy:

U. S. DIST. ATT'Y'S OFFICE,
Detroit, Feb'y 1st, 1864.

Cap't E. B. WARD, *Detroit.*

SIR: You are hereby notified that the U. States hold you re-
27 sponsible for the sum of $45,000 received by you from the Detroit and Milwaukie R. R. Company for the purpose of being delivered to the government upon a compromise of their claim against said road and yourself, and I hereby demand that you pay that sum over to the U. S. depository in this city, H. K. Sanger, esq., at once.

Respectfully, yours,

ALFRED RUSSELL,
U. S. Dist. Att'y E. D. Mich.

That said defendant then called upon the plaintiff's attorney, and insisted that he was under no obligation, legal or moral, to pay any sum whatever to the plaintiff, as said compromise had been entirely fair, but states that since making said compromise, he had learned of the clause in said mortgage of November 15th, 1860, and its provisions relating to said bonds, with which he was unacquainted at the time of said compromise, and as that might have put plaintiff's claim on said bonds on a better basis than it before stood, he was willing to and did pay over to plaintiff's att'y the check of which the following is a copy; that on the following morning, and before said check was presented for acceptance,

the defendant gave notice to the plaintiff's att'y and to H. K. Sanger, U. S. depositary, that said check would not be paid, and to the
28 Second National Bank not to pay the same.

That a two-cent stamp was put on said check by defendant, and a dollar and ten additional by the plaintiff's att'y before the paper became due, but after it was presented for acceptance, and after the defendant had given the said notices.

DETROIT, *Feb'y* 3, 1864.

Second National Bank of Detroit pay to Alfred Russell, U. S. att'y, or order, twenty-two thousand and twenty-eight dollars in twelve days from this date, in U. S. legal-tender notes.

$22,028 00. E. B. WARD.

[Int. rev. stamp, 2c.]
[Int. rev. stamp, $1\frac{10}{100}$.]

That at the time when said check was given, the defendant further said that in giving this check to the plaintiff, he was doing better by the plaintiff than he was doing by himself; that the government were getting about 75 per cent. on their claim, while he was getting only some 55 per cent. on what he claimed.

List of bonds, (see paragraph two,) showing number, date of execution, amounts secured, and name of sureties.

No.	Date.	Amount.	Sureties.
78	Dec. 13, 1856	12,653 00	N. P. Stewart.
81	" 24, "	6,139 20	N. P. Stewart, H. Ledyard.
29 95	May 19, 1857	86,093 30	N. P. Stewart, T. P. Whitmore.
96	" " "	3,757 00	" "
97	" " "	1,027 20	" "
100	June 1, "	12,424 25	N. P. Stewart, E. B. Ward.
101	" 1, "	903 90	" "
104	" 11, "	60 30	" "
105	" 11, "	13,088 10	" "
109	July 1, "	1,271 10	" "
110	" " "	389 40	" "
111	" " "	13,536 60	" "
112	" " "	4,547 20	" "
113	" " "	3,463 80	" "
123	" 8, "	10,529 40	" "
124	" " "	7,820 70	" "
150	Sept. 27, 1858	123 60	Brydges, Reynolds, Stuart, Ward.
151	" " "	7,581 36	" " " "
152	" " "	14,287 28	" " " "
153	" " "	1,017 60	" " " "
154	" " "	315 30	" " " "
155	" " "	4,036 50	" " " "
156	" " "	6,086 40	" " " "
169	Dec. 27, "	3,056 10	" " " "

C. I. WALKER,
Att'y for Defendant.
ALFRED RUSSELL,
U. S. Dist. Att'y.

Trowbridge's evidence.

30 The counsel for the plaintiff, further to maintain and prove the said issue on their part, called as a witness one C. C. TROWBRIDGE, who testified that he was secretary of the Detroit and Milwaukie Railway Company *Company*, and was so at the time the bonds in question were issued; that he is now president of the Detroit and Milwaukie Railroad Company, and has been so since May 1863; was just before that president director, and before that secretary and treasurer. He further testified that he heard no conversation about defendant's proposition to the railroad company, or of the fact of his having solicited a proposition from it until after it occurred, and that he received his
31 first information of such proposition from Mr. Brydges, managing director, or from Mr. Emmons, counsel for the railroad company; that after receiving such information and before writing said letter, defendant asked him (witness) what the board decided as to his proposition, and witness in reply then repeated, orally, to defendant the proposition as he understood it; and that said proposition as witness understood it and as he represented it to said defendant, as above stated, was fully expressed in the said letter of May 14. Witness further testifies that the Detroit and Milwaukie Railroad Company had entered upon their books as due on the duty bonds the sum of $76,000, and as a claim which was
32 expected to be paid, although the railroad company did not acknowledge any legal liability thereon; that the claim of defendant for becoming surety upon said bonds had been informally recognized by the company, and it was considered among the insecured debts of the Detroit and Milwaukie Railway Company which the new company expected to pay, but it had never been put upon the books nor formally recognized.

On cross-examination, the witness being shown the schedule of the stipulation signed W'm Gray, he further testified that he was not familiar with that stipulation; that he supposed that the claims mentioned in that schedule were intended to be secured in the claim of the mortgage executed by railroad company dated November 15, 1861, but he had no certain knowledge as to that; that at the time of the negotiation in 1863, all the sureties upon the duty bonds, with the exception of the defendant, were insolvent and had been for some time.

This was all the testimony of Mr. Trowbridge, and the plaintiffs introduced no further testimony but rested their case.

33 The mortgage from the Detroit and Milwaukie Railroad Company to A. H. Sibley, C. J. Brydges, and Richard Irvin, trustees, referred to in the above stipulation, (page 6,) contains the following provisions:

This indenture, made and entered into *into* this fifteenth day of November, A. D. 1860, by and between the Detroit and Milwaukie Railroad Company, a body corporate and politic, under and by virtue of the laws of the State of Michigan, parties of the first part, and Alexander Hamilton Sibley, of the city of Detroit, in the State of Michigan, Charles John Brydges, of the city of Hamilton, in the province of Canada, and Richard Irvin, of the city and State of New York, parties of the second part, trustees, witnesseth—

That whereas the Detroit and Milwaukie Railway Company, before the acquisition of its property, rights, privileges, and franchises, by the parties of the first part, did execute a certain indenture of mortgage upon its property and franchises to Erastus Corning, Frederick C. Geb-

hardt, and George F. Porter, dated April 24th, A. D. 1855, and conditioned to secure the payment of two and a half millions of dollars; and did also execute a further mortgage upon its property and
34 franchises to John Owen and James V. Campbell, dated April 28th, 1856, and conditioned to secure the payment of one million of dollars, both of which mortgages are duly recorded, and did under said first mortgage issue bonds to the amount of two and a half millions of dollars, and under said second mortgage to the amount of one million of dollars:

And whereas it is desirable for the interests of the parties of the first part that the holders of the bonds issued under the two mortgages above mentioned and referred to should fund five of the interest coupons thereto annexed, viz, those due May and November, A. D. eighteen hundred and sixty, May and November, 1861, and May, A. D. 1862, for the period and upon the conditions hereinafter contained:

Now, therefore, the said parties of the first part hereby covenant and agree to and with the parties of the second part as follows, viz:

First. That the said parties of the first part will, by or through the trustees, the parties of the second part hereto, issue and deliver to the bondholder or bondholders who shall deposit with said trustees the said five coupons attached to the bonds held or owned by them,
35 bonds or certificates of the parties of the first part for the amount of the coupons surrendered, which bonds or certificates shall be in such sums as may be determined upon by said trustees, shall bear even date herewith, shall be payable on or before the first day of January, A. D. 1866, at Duncan, Sherman and Co., New York City, and shall have annexed thereto interest coupons for interest from the maturity of such surrendered coupons, the first of such coupons to be payable on the first of July, A. D. 1861, and to be for all interest to that date, and the remaining coupons to be payable on the first day of each January and July thereafter.

Second. The parties of the first part further covenant and agree to and with the parties of the second part, that they will pay at maturity all the certificates and bonds so issued for said surrendered coupons, and also all the interest upon and all coupons to the same annexed, and also all the original bonds, the five coupons whereof are so deposited or surrendered, and also all the interest coupons annexed to said last original bonds, which mature after the fifteenth day of May, A. D. 1862.

And further, the parties of the first part do hereby covenant
36 and agree that the said two mortgages of the Detroit and Milwaukie Railway Company, heretofore mentioned, so far as they are intended to secure the bonds and coupons, five of the coupons whereof are funded as hereinbefore provided, shall, and the same are hereby recognized and acknowledged to be valid and subsisting liens upon the property, estate, rights, privileges, and franchises of the parties of the first part, of every nature and description, and from whomsoever derived, in their respective order of priority and in as full and ample a manner for all purposes as if the same had been executed by the parties of the first part hereto. It being, however, expressly understood, covenanted, and agreed that such recognition and acknowledgment shall apply and be valid only to and for the benefit of the holders of bonds issued under said mortgages, the said five coupons whereof shall be funded as aforesaid.

It being, however, distinctly understood and agreed that nothing herein contained shall be at any time, or in any manner, or by estoppel, or otherwise, be construed as an admission of the legality or validity of

any claims or liens whatever against the parties of the first part,
37 or their property, or franchises, save for the benefit of the holders of the bonds the five coupons whereof are funded or carried as aforesaid, the sole intent and design of these presents being to give this mortgage as collateral security for the benefit of the holders of these bonds, the said five coupons whereof are so funded or carried as aforesaid.

And the parties of the first part do further covenant and agree to and with the parties of the second part, that after paying the necessary costs and expenses of maintaining, operating, and repairing their railroad, including the payment of damages for accidents, they will apply the earnings and income of said railroad during the pendency of the trust hereby created as follows, to wit:

1st. To the payment of the costs, expenses, and charges of the trust hereby created, including a reasonable compensation to the trustees.

2d. To the payment of the interest semi-annually upon the bonds issued by the Detroit and Pontiac and Oakland and Ottawa Railroad Companies, and which bonds in all amount to about seven hundred and six thousand dollars.

38 3rd. To the payment of interest upon the bonds or certificates to be issued for the coupons surrendered as hereinbefore provided for.

4th. To the payment of the debts of the Detroit and Milwaukie Railway Company, not exceeding the sum of five hundred thousand dollars, and for which the parties of the first part are to issue their obligations, including the amount due upon the steamers Detroit and Milwaukie, the taxes due to the State of Michigan, the duties owing to the government of the United States, and ticket and freight balances due to other connecting roads; and that if, after the payment of the foregoing, there be, prior to November 15th, 1862, any surplus, the same shall be applied, in such fair and equitable manner as to the said trustees shall seem just and proper, to the payment of the certificates and bonds issued for said surrendered coupons.

5th. To the payment of the interest coupons maturing after May, A. D. 1862, which are annexed to bonds the five coupons, whereof are surrendered as aforesaid.

6th. To the payment, in such just manner as to said trustees shall seem best, of the bonds and certificates issued as hereinbefore
39 provided for, on the surrender of coupons, until all the same are paid in full.

Further, the parties of the first part do covenant and agree with the parties of the second part, to furnish them by the fifteenth of each month a statement of the receipts and disbursements of the previous calendar month; and also that they will, at all proper and reasonable times, suffer the said parties of the second part, by inspection and examination of their books, accounts, vouchers, and otherwise, to inform themselves as to the proper appropriation of the income of said road.

And further, the parties of the first part do covenant and agree that in case any of the holders or owners of the said Detroit and Milwaukie Railway Company bonds do not for any cause surrender the said five coupons thereof to said trustees, but do in fact refrain, until the first day of January, A. D. 1866, from any attempt to enforce payment of any such coupons, that then, and in such case, all the benefits and advantages of this mortgage, except as to the payment of interest on coupons, shall enure to the benefit of, and be applicable to, such bonds, the same in all respects as if the said coupons of the same had been surrendered to the trustees.

Now, therefore, this indenture witnesseth that the said parties
40 of the first part, in order to secure the full and faithful performance of all and singular the covenants and agreements hereinbefore contained for the benefit of the bonds, the five coupons whereof are so surrendered, or are not sought to be enforced until the first day of January, A. D. 1866, and in consideration of one dollar to them in hand paid at the ensealing and delivery of these presents, by the parties of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, aliened, conveyed, confirmed, assigned, transferred, and set over, and by these presents do grant, bargain, sell, alien, convey, confirm, transfer, assign, and set over unto the said trustees, parties of the second part, all and singular the railroad of the said company, parties of the first part, in and from Detroit, in the county of Wayne, to and in Grand Haven, in the county of Ottawa, in the State of Michigan, together with all the rights of way and all the lands occupied thereby, or in any way used or connected therewith; and also all the wharves, docks, bridges, viaducts, culverts, depots, depot-grounds, and depot-stations, stations, station-grounds, and also all the superstructure thereon, and also all the build-
41 ings, erections, tracks, and frogs connected *connected* therewith, or built or placed thereon, now owned or used by the parties of the first, or that they are in any interested in, and all their estate therein, and all the franchises, rights, and privileges of the said parties of the first part; and also all the rolling stock, and all the locomotives, engines, wagons, cars, machinery, tools, rails, spikes, materials, and all and singular all other personal property, goods, and chattels, now owned by said parties of the first part hereto, or to which, or any interest in which, said parties of the first part are in any way entitled, including all property acquired by the parties of the first part by assignment from the purchasers of the Detroit and Milwaukie railway, and including the property that was acquired by the Detroit and Milwaukie Railway Company in the name of its officers, or any of them, or the trustees of its mortgages, or in the name of any other person on its behalf, or by means of funds in any way contributed by said company; and also all the right, title, and interest which the parties of the first part now have, or may hereafter acquire by contract, purchase, or otherwise, of, in, and to the steamboats named and called respectively
42 the Detroit and Milwaukie, and which are now in use in the business of the said parties of the first part.

To have and to hold the above bargained and described property, rights, privileges, hereditaments, and franchises unto the said Alexander Hamilton, Sibley, Charles John Brydges, and Richard Irvin, and the successor of them and their successors in said trust and assigns, in trust always, however, and upon the following trusts and conditions, viz., etc., etc.:

43 The counsel for the defendant, to maintain and prove the said issue on his part, gave, in evidence, the following stipulation:

Circuit court of the United States for the eastern district of Michigan.

THE UNITED STATES OF AMERICA
vs.
EBER B. WARD.

It is admitted by the plaintiff in the above-entitled cause, that Joseph Miller, jr., esq., then the plaintiff's att'y for this district, wrote, on the

1st of March, 1865, to the Solicitor of the Treasurer, at Washington, in relation to the bonds executed by the Detroit and Milwaukie Railway Company and their sureties to the plaintiff, being the same bonds the settlement or compromise of which is in controversy in this suit, as follows:

"Messrs. Ward and N. P. Stewart assure me that they shall remonstrate against any delay in commencing suits upon the bonds."

And that, upon the 9th of March, A. D. 1860, the said Ward and Stewart enclosed to said Miller, to be forwarded to the Secretary of the Treasury, a petition remonstrating against any such delay and against any agreement for an extension of time to the Railway Company, which petition was duly forwarded by the said Miller.

It is further stipulated, that previous to the commencement of
44 this suit the defendant offered to Gains, the special agent of the Treasury Department, sent here from Washington to examine into the facts of this case in the presence of the plaintiff's attorney, that if the plaintiff would return the $35,000, paid by defendant to plaintiff, he, the defendant, would return to the plaintiff the bonds aforesaid uncancelled. He had previously made the same offer to said attorney.

The above facts are to be admitted in evidence, subject to all objection of competency or relevancy.

ALFRED RUSSELL,
U. S. Dist. Att'y.

And the counsel for the defendant, further to maintain and prove the said issue on his part, gave in evidence the following extracts from the official correspondence between the plaintiff's attorney and the Solicitor of the Treasury:

Attorney to Solicitor, February 3, 1864.

"Receipt of U. S. Depositary Sauger, for check of Captain E. B. Ward, (surety on said bonds,) for $22,028, is herewith enclosed."

I had hoped that Capt. Ward, after my demand, a copy of which I sent you, would have viewed the matter of his liability as I did,
45 and paid over the remainder of the money which he received, but he at this time declines to pay over any more.

"The sum above referred to with the sum of $35,000 heretofore paid makes the sum of $57,028, which is 75 % of the sum admitted to be due upon the bonds, viz, $76,038, and Capt. Ward continues to retain the difference between $57,028 and $80,000, which he received from the company, and which difference is 55 % upon his alleged claim against the company as he claims. * * *

"I have some expectation of being able to report a further payment without a resort to compulsory proceedings."

Attorney to Solicitor, February 19, 1864.

After stating non-payment of check and protest, letter proved.

"The maker of the check, as I understand from his attorney, signifies his willingness to pay it without litigation in case any claim for a further sum should be relinquished.

"I respectfully suggest the propriety of suit upon the check and a bill in chancery as heretofore mentioned."

Solicitor to attorney, February 22d, 1864.

"As to the intimation that he would be willing to pay the check
46 for $22,028, on the relinquishment of any claim to a large sum mentioned in your last letter, I can only say that no such relinquishment can be made."

And the counsel for the defendant, further to maintain and prove the said issue on his part, gave in evidence the following stipulation made and entered into in a certain cause wherein Charles J. Bridges, Thomas Reynolds, and Henry C. R. Beecher were complainants, and the Detroit and Milwaukie Railway Company defendant, being the same cause mentioned in the stipulation introduced by the plaintiff, by and between the counsel for said complainants and the counsel for said defendants.

The circuit court of the United States for the district of Michigan.—In chancery.

CHARLES J. BRIDGES, THOMAS REYNOLDS, AND Henry C. R. Beecher,
vs.
THE DETROIT AND MILWAUKIE RAILWAY COMpany.

In the above entitled cause it is hereby mutually stipulated and agreed as follows:

The solicitor and counsel for the defendant hereby consent and stipulate that the decree prepared by the solicitor for complainants may be entered in this cause on the sixth day of August, in the year of our Lord one thousand eight hundred and sixty.

47 In consideration whereof the solicitor for the complainants consent and stipulate as follows:

1. At the sale under said decree the complainants will, in their own names or in the names of other persons, bid in the mortgaged property, premises, and franchises, provided the same is not bid up beyond the amount of the decree by other parties.

2. At once after the sale and its confirmation, if complainants are the purchasers in their own or said other persons' names, a new corporation shall be organized under the laws of the State of Michigan, which shall succeed to all the property, rights, and franchises so sold.

3. That upon the organization of the said new corporation seven per cent. preferred stock in said new corporation, to an amount equal to the amount due for principal and interest upon the bonds mentioned and foreclosed in this cause, shall be issued and delivered to the respective holders of the said bonds foreclosed in this suit.

4. That a sufficient amount of equal and similar preferred stock shall be issued and tendered to the creditors of the present corporation whose names or debts are mentioned or described in Schedule A, hereto annexed, in payment of the said claims or debts.

5. That common stock in said new corporation shall be issued to the holders of stock in the present corporation to the amount of twenty per cent. on the amount of stock held by them respectively in
48 the present corporation, including as well part paid as well as full paid stock, to the extent of actual payments.

6. That at once upon its organization the notes or other evidences of indebtedness of the said new corporation shall be issued and tendered

to the creditors of the present corporation whose names or claims are mentioned or described in Schedule B, hereto annexed, in payment of such debts or claims, which notes or evidences of debt shall be payable at as short times as the probable earnings of the road will warrant.

7. That seven per cent. preferred stock in the said new corporation shall be issued to an amount equal to the aggregate amount of the debts mentioned or described in the schedule hereto annexed, marked C, and that, by the sale of said stock or otherwise, said new corporation will pay said debts as follows, viz: One-third on the first day of June, in the year of our Lord one thousand eight hundred and sixty-one; one-third on the first day of June, in the year of our Lord one thousand eight hundred and sixty-two; and one-third on the first day of June, in the year of our Lord one thousand eight hundred and sixty-three, with interest as follows, namely: Interest on the whole sum on the first day of June, in the year of our Lord one thousand eight hundred and sixty-one, and interest after that semi-annually on all remaining
49 unpaid, such preferred stock to be of equal value and priority in all respects with any other preferred stock issued by said new corporation.

8. And it is further mutually covenanted and stipulated and agreed, that in the event that the complainants and such new corporation do not fully and fairly perform and carry out the said foregoing stipulations, by or before the first day of June, in the year of our Lord one thousand eight hundred and sixty-one, that then, upon presentation of this stipulation to the court, the said decree and the sale, and all other proceedings had under said decree, shall be at once set aside and vacated, and the defendant shall be allowed to file an amended answer and to defend against the bill of complaint in this cause.

DETROIT, *August 4th*, 1868.

Schedule B, mentioned and referred to in the foregoing stipulation, contains, amongst others, the following clauses:

"The amount due under the resolution of the company of date
50 May 22d, 1857, to persons who became sureties for the company for duties due on iron to the federal government, as specified in said resolution, and the amount of an award made by John Owen and E. C. Litchfield in favor of W. P. Stewart, esquire, the sum of $145,000 00, to be paid to Charles J. Brydges and Thomas Reynolds, trustees.

All sums due the federal government for duties upon railroad iron and which now amount to about the sum of $94,000 00.

And the counsel for the defendant, further to maintain and prove the issue on his part, gave in evidence the following deposition of Eber B. Ward, the defendant.

Circuit court of the United States for the eastern district of Michigan.

THE UNITED STATES }
vs.
EBER B. WARD. }

I, Eber B. Ward, being duly sworn, do depose and say: that I
51 am the defendant in the above entitled cause. On the 3d of February, A. D. 1864, I handed Alfred Russell, esq., plaintiff's attorney for the district, a check upon the Second National Bank of Detroit, for the sum of $22,028 00, which I subsequently directed not to be paid. Said check was not given by way of compromise or settlement of any claim

made against me by the United States, and it was not so stated or understood by myself nor so stated by Mr. Russell; on the contrary, Mr. Russell distinctly disclaimed either the power or the intention to accept the same by way of compromise or settlement, and it was fully understood between us both that it was not so given on the one hand or received on the other. Mr. Russell had previously demanded of me the sum of $45,000 00 as received by me "from the Detroit and Milwaukie Railroad Company for the purpose of being delivered to the government, upon a compromise of their claim against said road" and myself. I insisted distinctly to said Russell that said $45,000 00 was not received by me to be paid to the government, but was for and belonged to myself; that the compromise I had already made with the government was a fair one, and that I was under no obligations, legal or moral, to pay over one cent to them; but I stated that since making said compromise I had learned of the existence of a mortgage which seemed
52 to give the government a better security than I at the time supposed they had, and with reference to that and to that alone I was willing to pay over the amount of said check to the plaintiffs' attorney. I knew nothing previously about the award to me of $16,000 by the Detroit and Milwaukie Railway Company, was not a party to it, and never accepted it. I did not limit my claim to $16,000; it was a general one. N. P. Stewart, the only surety with me on the bonds, was insolvent, and as I was the only solvent surety, I claim that I am entitled to the whole amount to be awarded for such services.

The counsel for the defendant here rested his case.

There was no testimony in the case except what appears in this bill of exceptions.

The evidence being closed, the defendant requested the court to charge the jury as follows:

That there is no evidence in this case which tends to show that the Detroit and Milwaukie Railroad Company ever became legally liable to the plaintiff to pay the bonds in question.

But said circuit judge refused so to charge said jury, to which refusal the said counsel for the defendant did then and there, in behalf of said defendant, except.

53 And the counsel for the defendant thereupon further requested the court to charge the jury as follows:

That the provision in the mortgage in trust of 1860 is simply a covenant upon the part of the trustees to apply the earnings of said road in a certain contingency to the payment of this, together with other indebtedness of the railway company.

But said circuit judge refused so to charge said jury, to which refusal the said counsel for the defendant did then and there, in behalf of said defendant, except.

And the counsel for the defendant thereupon further requested the court to charge the jury as follows:

There is evidence which tends to prove that the defendant had a valid claim against the railway company, and that the railroad company recognized it as one of the claims which they expected o pay.

But said circuit judge refused so to charge said jury, to which refusal the said counsel for the defendant did then and there, in behalf of said defendant, except.

And the counsel for the defendant thereupon further requested the court to charge the jury as follows:

54 That the railroad company were under the same legal obliga-

tions to pay the claim of the defendant as they were the bonds held by the plaintiff.

But said circuit judge refused so to charge said jury, to which refusal the said counsel for the defendant did then and there, in behalf of said defendant, except.

And the counsel for the defendant thereupon further requested the court to charge the jury as follows:

There is no evidence tending to prove that the defendant was a party to the award, limiting his claim to $16,000, or that he was bound by such award.

But said circuit judge refused so to charge said jury, to which refusal the said counsel for the defendant did then and there, in behalf of said defendant, except.

And the counsel for the defendant thereupon further requested the court to charge the jury as follows:

That the evidence upon the part of the plaintiff tends to show that the $80,000 paid by the railroad company to the defendant was paid under the written proposition of May 14, 1863.

But said circuit judge refused so to charge said jury, to which refusal the said counsel for the defendant did then and there, in behalf of said defendant, except.

55 And the counsel for the defendant thereupon further requested the court to charge the jury as follows:

There is no evidence tending to prove that the original verbal proposition referred to in said written proposition was any different from the written one.

But said circuit judge refused so to charge said jury, to which refusal the said counsel for the defendant did then and there, in behalf of said defendant, except.

And the counsel for the defendant thereupon further requested the court to charge the jury as follows:

There is no evidence tending to prove that said $80,000 was paid over to the defendant for any other purpose than that mentioned in said written proposition.

But said circuit judge refused so to charge said jury, to which refusal the said counsel for the defendant did then and there, in behalf of said defendant, except.

And the counsel for the defendant thereupon further requested the court to charge the jury as follows:

That that proposition did not constitute the defendant the agent of the company to pay over to the plaintiff the sum of $80,000, or
56 any given sum, but under it he was at liberty to make any arrangement he saw fit with the plaintiffs for a settlement and cancellation of the bonds held by them.

But said circuit judge refused so to charge said jury, to which refusal the said counsel for the defendant did then and there, in behalf of said defendant, except.

And the counsel for the defendant thereupon further requested the court to charge the jury as follows:

That if the jury find that said $80,000 was paid to the defendant by the railroad company under said proposition, the plaintiffs are not entitled to recover any portion of the money thus paid to him, as in such case it was not paid to the defendant for the use of the plaintiffs, but to pay him in full for his own services and claims, and for procuring the settlement and cancelling of the bonds held by the plaintiffs, and for the delivery of the same to the railroad company.

But said circuit judge refused so to charge said jury, to which refusal the said counsel for the defendant did then and there, in behalf of said defendant, except.

And the counsel for the defendant thereupon further requested the court to charge the jury as follows:

57 And even if the jury find that the defendant was guilty of either fraudulent disclosures or concealments in his negotiations with the plaintiff and thereby obtained the compromise in question, the plaintiff cannot recover in this action unless they find under the charge of the court that the whole $80,000 was specifically paid to the defendant to pay the plaintiff.

But said circuit judge refused so to charge said jury, to which refusal the said counsel for the defendant did then and there, in behalf of said defendant, except.

And the counsel for the defendant thereupon further requested the court to charge the jury as follows:

The defendant was under no obligation to disclose to the plaintiff the proposition made to him by the railroad company, and not disclosing said proposition is not therefore evidence of fraud.

But said circuit judge refused so to charge said jury, to which refusal the said counsel for the defendant did then and there, in behalf of said defendant, except.

And the counsel for the defendant thereupon further requested the court to charge the jury as follows:

58 There is evidence that tends to show that there was a reasonable doubt whether the sureties upon said bonds had not been discharged from their liabilities thereon, and the statements made by defendant to the plaintiff that such doubts existed are not evidence of fraud.

But said circuit judge refused so to charge said jury, to which refusal the said counsel for the defendant did then and there, in behalf of said defendant, except.

And the counsel for the defendant thereupon further requested the court to charge the jury as follows:

That there is no evidence tending to show that any specific portion of the $80,000, except the $35,000, was paid to the defendant to be paid to the plaintiff.

But said circuit judge refused so to charge said jury, to which refusal the said counsel for the defendant did then and there, in behalf of said defendant, except.

And thereupon the said judge did then and there declare and deliver his opinion to the jury aforesaid, as follows:

59 "GENTLEMEN OF THE JURY: The Detroit and Milwaukie Railway Company, in 1857 and 1858, gave the United States certain bonds for the payment of duties on railroad iron. On all these bonds defendant Ward was surety, with other person or persons. The duty on the iron amounted to about $100,000. The company procured the sureties on these bonds by a commission of $10,000 annually, to any persons who would become surety.

"In 1860 the company was insolvent, and certain mortgages were foreclosed and the property and franchises of the corporation were sold to private parties, and thereupon in that year a reorganization of the company was effected, or a new corporation formed, under and by virtue of an act of the State legislature, absolved, as is claimed, from the debts of the old organization. The new company, however, did recognize certain of the debts of the old organization, and executed a

trust mortgage which applied the earnings of the road to the payment thereof. Among the old indebtedness so recognized and provided for was the debt to the United States on those duty bonds.

"In April, 1863, the earnings of the road had been considerable, and had enabled the trustees to pay off several of the debts which the new company had recognized, but the duty bonds had not been paid;
60 only some $6,000 in gold had been paid of the duties, and now defendant Ward, said to be the only solvent surety, applies to the board of directors of the new company, which had taken the name of the Detroit and Milwaukie Railroad Company, to have those duty bonds settled and paid, that he might be relieved from liability. He so far succeeded as to get a verbal proposition from them in April, 1863, as a basis for effecting a compromise with the government. It is for you to say what the oral arrangement was between the defendant and the company. The written proposition was not made out, you will remember, till May 14. Ward now sought the U. S. district attorney, Mr. Russell, and proposed a compromise. He was preceded by Mr. Emmons, attorney of the railroad company, who called on Mr. Russell and had a conversation about a compromise of the duty bonds, suggesting difficulties the government would have in collecting, and serious doubts whether any recovery could be had thereon, but intimating that he was disposed to advise the company to offer the plaintiff $20,000. When Mr. Ward called upon the attorney of the government a few days afterwards, (this was in April, 1863, and after his interview with the board of directors,) he stated that he had been urging the directors to do some-
61 thing in relation to said bonds; that he thought they were going to have some money that could be applied to this purpose, and that they would do something in relation thereto.

Defendant then made an offer to pay $35,000 in full of said bonds, saying that, whether the railroad did or did not furnish any money, as he expected they would, he would pay that sum out of his own funds, and saying that the company was apt to be behind when money was to be paid. Defendant also urged reasons why the offer was a fair one, such as a legal defence against the bonds, etc., which you will remember.

Defendant requested plaintiff's attorney to communicate his offer to the proper department at Washington, which was done on the 13th of May, with the grounds of defense alleged by defendant and the railroad company, and a recommendation of acceptance.

Now we come to the written proposition of May 14, 1863, which is as follows:

Capt. E. B. WARD:

MY DEAR SIR: Referring to the conversation we have had on the subject of the duty bonds due the United States, I am authorized to say that if you can procure the settlement and cancelling of them for a sum not exceeding eighty thousand dollars currency, that sum
62 to include your services, and any claim you may have against the company on account of these bonds, the company is ready to pay and will that sum—one-half on your making the arrangement with the government, and the other half within thirty days thereafter. This offer, however, not to be considered as waiving any defense the company has to said bonds and claims.

Yours, truly,

C. C. TROWBRIDGE, *President.*

DETROIT, *May* 14, 1863.

It is claimed by the government that defendant had been authorized at the time of his interview with the plaintiff's attorney, in April, to effect a settlement of the duty bonds at a sum not exceeding $80,000, and that he withheld that fact from the government, and made representations, all of which it is claimed was a fraud on the government, and releases it from the terms of the compromise which resulted from that interview. Of this I will speak by and by.

On the 24th of July, 1863, defendant requested complainant's attorney to let him take said bonds, but the attorney replied that the Secretary of the Treasury had not accepted the offer of defendant, and he had no authority to part with the possession of the bonds. It
63 was finally arranged that defendant should deposit $35,000 and take the bonds, but return them if his offer was rejected. On the next day defendant delivered the bonds to the railroad company, without the knowledge or consent of the plaintiff's attorney, and received from the company $80,000, of which $60,000 was cash, and $20,000 in a short time check, which was afterwards paid. Defendant did not inform any of the officers of the railroad company of his offer to plaintiff's attorney.

Such are the outlines of the case presented. The Secretary of the Treasury accepted Ward's offer July 29, 1863.

I do not deem it necessary to determine, as I am requested to do, whether there was a legal liability against the new railroad company on the duty bonds to the government, nor whether that company was liable to defendant for having become surety on those bonds. It is enough that this new organization had recognized those bonds and made provision through the trust mortgage for their payment, and then proposed, in the proposition, oral and in writing, made to defendant, to pay, to procure a settlement and cancellation of those bonds, a sum not exceeding $80,000, that sum to include defendant's services and any claim he might have against the company on account of those bonds.

64 These facts are sufficient for the purposes of this case, without determining anything in reference to the legal liability of the new company for any of this indebtedness.

There have been many questions raised and requests made for instructions, which I do not deem it necessary to particularly refer to. It would tend to confuse your understanding to multiply instructions. As I proceed I shall endeavor to embrace in my instructions all that is material. I am happy to say that my brother Wilkins agrees with the views I shall express.

You are instructed that it is for the jury to find what the ar-
65 rangement or proposition was between the railroad company and defendant, Ward, in reference to a compromise of those bonds, whether there was any other and different proposition than that reduced to writing May 14, 1863; or whether that evidences the precise terms existing between the railroad company and defendant, when defendant opened negotiations with Mr. Russell, attorney for the government, in April previous. You are at liberty to take into consideration all the facts and circumstances which have been developed by the evidence in determining what the arrangement between the defendant, Ward, and the railroad company was, at the time he made the proposition to the government of $35,000, in April, 1863. Upon your finding in that respect depends your verdict.

I instruct you that defendant Ward was in conscience and equity bound under the circumstances of the interview, when he offered $35,000 in the

Objection no ruling on the case to which exception

compromise to the attorney of the government to disclose whatever information he possessed, not accessible alike to both parties, which would materially affect or influence the decision of the government in coming to a conclusion upon the offer of $35,000, so that if he misrepresented or concealed any material fact which the government ought to have been informed of, and thereby obtained a surrender of the bonds for a
66 less sum than would have been demanded had the governme[nt] been fully advised, the government is not bound to abide by t[he] settlement.

Again, if you find that the defendant was to receive, and did receiv[e] the $80,000 to be paid to the government for a settlement and canc[el]ment of these bonds, then the United States is entitled to recover in th[is] action for money had and received the $80,000, deducting the $35,0[00] which has been paid.

On the contrary, if you find that the $80,000 was to be paid, and w[as] paid to defendant by the railroad company under an arrangement b[e]tween defendant and the railroad company, by which he was at liber[ty] to make the best compromise he could, and apply any portion of t[he] fund that should remain to his private use, whether in payment of s[er]vices, and of his claim against the old company for having been sure[ty] on the bonds, or otherwise, then the United States is not entitled to r[e]cover in this action for money had and received. In other words, t[he] government can recover in this action for money had and received on[ly] when it is established that the $80,000, or some portion of it over t[he] $35,000 already paid, was paid defendant for the United States. A[l]inasmuch as there is evidence, taking all the facts and circumstanc[es] into consideration, tending to show that the written proposition of M[ay] 14, 1863, does not evidence fully the terms made to defenda[nt]
67 Ward, by the railroad company in April, when he made to t[he] attorney of the plaintiff the compromise offer of $35,000, I [do] not deem it necessary or expedient to say what the legal effect of th[e] writing is; as, if in your opinion it is but a partial expression of t[he] arrangement, or is different from the oral arrangement of April, a c[on]struction would only tend to complicate your inquiries.

We do not regard defendant's claim for becoming surety on the bon[ds] for the old railway company as resting on as favorable basis with t[he] new company as the government claim on the bonds; for the latter h[as] been recognized up to $76,000, and interest from, I think, Februa[ry] 1860, while there is no evidence that defendant's claim had ever be[en] recognized by the new company, except what is said in the written p[ro]position of May 14, where it is said "any claim (Ward) may have agai[nst] the company on account of those bonds."

You are instructed that the $22,000 check was not void in the han[ds] of the government for want of a stamp.

If there can be no recovery in this case on the ground that the balan[ce] of the $80,000 over the $35,000 paid equitably belongs to plaint[iff]
68 there can be no recovery on the check, and I so instruct you; then it would be without consideration and a mere gratuity, a[nd] the payment being stopped would not entitle plaintiff to recover un[der] the circumstances of this case.

I instruct you that the action for money had and received is an equita[ble] action, and under this form of action the plaintiff may recover for a money which the defendant has; that in equity and good conscience t[he] government is entitled to demand.

It is exceedingly important that you agree upon a verdict. This [is] the third trial, and we must have a verdict, if possible for you to agr[ee]

There are no difficulties in this case, it would seem, to prevent your arriving at a conclusion. If you can determine what the arrangement was between Ward and the railroad company, you will have solved the question, for the court has instructed you when there will be a liability and when there is no liability, depending upon what you find the contract to be.

To each of which several opinions, instructions, and charges of the said circuit judge to the said jury, except the instruction and
69 charge concerning the check, the counsel for the said defendant did then and there, in behalf of the said defendant, duly except.

And as the matters above mentioned do not appear of record in the above cause, at the request of defendant I have signed and sealed this bill of exception the day and year above mentioned.

SOLOMON L. WITHERS,
U. S. District Judge Western District of Michigan,
Presiding on the trial of said Cause in said Court.

(Indorsed:) No. 4337. United States circuit court for the eastern district of Michigan. The United States vs. Eber B. Ward. Bill of exceptions. Filed May 24th, 1870. A. Mandell, clerk.

70 In the Supreme Court for the United States of America at Washington.

EBER B. WARD, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR.

And now comes the said plaintiff in error, by C. I. Walker, his attorney and says that, in the record and proceedings aforesaid there is manifest error; in this, to wit:

1. In the refusal of the court to charge the jury, as requested by the counsel for said plaintiff in error, (defendant below,) "that there is no evidence in this case which tends to show that the Detroit and Milwaukee Railroad Company became legally liable to the plaintiff to pay the bonds in question."

2. In the refusal of the court to charge the jury, as requested by the counsel for said plaintiff in error, (defendant below,) "that the provision in the mortgage in trust of 1868 is simply a covenant upon the part of the trustees to apply the earnings of said road in a certain contin-
71 gency to the payment of this, together with other indebtedness of said railway company."

3. In the refusal of the court to charge the jury, as requested by the counsel for said plaintiff in error, (defendant below,) that "there is evidence which tends to prove that the defendant had a valid claim against the railway company, and that the railroad company recognized it as one of the claims which they expected to pay."

4. In the refusal of the court to charge the jury, as requested by the counsel for said plaintiff in error, (defendant below,) "that the railroad company were under the same obligations to pay the claim of the defendant as were they the bonds held by plaintiff.

5. In the refusal of the court to charge the jury, as requested by the counsel for said plaintiff in error, (defendant below,) that "there is no evidence tending to prove that the defendant was a party to the award, limiting his claim to $16,000, or that he was bound by such award.

72 6. In the refusal of the court to charge the jury, as requested by the counsel for said plaintiff in error, (defendant below,) "that the evidence on the part of the plaintiff tends to show that the $80,000 paid by the railroad company to the defendant was paid under the written proposition of May 14, 1863.

7. In the refusal of the court to charge the jury, as requested by the counsel for said plaintiff in error, (defendant below,) that "there is no evidence tending to prove that the original verbal proposition referred to in said written proposition was any different from the written one."

8. In the refusal of the court to charge the jury, as requested by the counsel for said plaintiff in error, (defendant below,) that "there is no evidence tending to prove that said $80,000 was paid over to defendant for any other purpose than that mentioned in said written proposition."

9. In the refusal of the court to charge the jury, as requested by the counsel for said plaintiff in error, (defendant below,) "that that
73 proposition did not constitute the defendant the agent of the company to pay over to the plaintiff the sum of $80,000, or any given sum, but under it he was at liberty to make any arrangement he saw fit with the plaintiff for a settlement and cancellation of the bonds held by them."

10. In the refusal of the court to charge, as requested by the counsel for said plaintiff in error, (defendant below,) "that if the jury find that said $80,000 was paid to the defendant by the railroad company under said proposition, the plaintiffs are not entitled to recover any portion of the money thus paid to him, as in such case it was not paid to the defendant for the use of the plaintiff, but to pay him in full for his own services and claims and for procuring the settlement and cancellation of the bonds held by the plaintiff, and for the delivery of the same to the railroad company."

11. In the refusal of the court to charge, as requested by the counsel for said plaintiff in error, (defendant below,) that "and even if the jury find that the defendant was guilty of fraudulent disclosures or
74 concealments in his negotiations with the plaintiffs, and thereby obtained the compromise in question, the plaintiff cannot recover in this action unless they find under the charge of the court that the whole $80,000 was especially paid to the defendant to pay to the plaintiff."

12. In the refusal of the court to charge the jury, as requested by the counsel for said plaintiff in error, (defendant below,) that "the defendant was under no obligation to disclose to the plaintiff the proposition made to him by the railroad company, and not disclosing said proposition is not therefore evidence of fraud."

13. In the refusal of the court to charge the jury, as requested by the counsel for said plaintiff in error, (defendant below,) that "there is no evidence that tends to show that there was a reasonable doubt whether the sureties upon said bonds had not been discharged from their liabilities thereon, and the statements made by defendant to the plaintiff that such doubts existed are not evidence of fraud."

14. In the refusal of the court to charge the jury, as requested
75 by the counsel for said plaintiff in error, (defendant below,) "that there is no evidence tending to show that any specific portion of the $80,000, except the $35,000, was paid to the defendant to be paid to the plaintiff."

That the said circuit judge, at the trial of said cause, erred in giving to the jury the following instructions, to wit:

1. "You are instructed that it is for the jury to find what the arrange-

ment or proposition was between the railroad company and defendant Ward in reference to a compromise of those bonds; whether there was any other and different proposition than that reduced to writing May 14, 1863; or whether that evidences the precise terms existing between the railroad company and defendant, when defendant opened negotiations with Mr. Russell, attorney for the government, in April previous. You are at liberty to take into consideration all the facts and circumstances which have been developed by the evidence, in determining what the arrangement between defendant Ward and the railroad company was, at the time he made the proposition to the government of
76 $35,000, in April, 1863. Upon your finding in that respect depends your verdict."

2. I instruct you that the defendant Ward was in conscience and equity bound under the circumstances of the interview when he offered $35,000, in the compromise to the attorney of the government, to disclose whatever information he possessed not accessible alike to both parties, which would materially affect or influence the decision of the government in coming to a conclusion upon the offer of $35,000. So that if he misrepresented or concealed any material fact which the government ought to have been informed of, and thereby obtained a surrender of the bonds for a less sum than would have been demanded had the government been fully advised, the government is not bound to abide by the settlement.

3. Again, if you find that the defendant was to receive, and did receive, the $80,000 to be paid to the government for a settlement and cancelment of these bonds, then the United States is entitled to recover in this action for money had and received the $80,000, deducting the $35,000 which has been paid.

77 On the contrary, if you find that the $80,000 was to be paid, and was paid, to defendant by the railroad company under an arrangement between defendant and the railroad company by which he was at liberty to make the best compromise he could, and apply any portion of the fund that should remain to his private use, whether in payment of services and of his claim against the old company for having been surety on the bonds, or otherwise, then the United States is not entitled to recover in this action for money had and received. In other words, the government can recover in this action for money had and received only when it is established that the $80,000, or some portion of it over the $35,000 already paid, was paid defendant for the United States.

4. And inasmuch as there is evidence, taking all the facts and circumstances into consideration, tending to show that the written proposition of May 14, 1863, does not evidence fully the terms made to defendant Ward, by the railroad company, in April, when he made to the attorney of the plaintiff the compromise offer of $35,000, I do not deem necessary or expedient to say what the legal effect of that proposition is; as, if in your opinion it is but a partial expression of the arrangement, or is different from the oral arrangement of April, a construction would
78 only tend to complicate your inquiries.

5. We do not regard defendant's claim for becoming surety on the bonds for the old railway company as resting on as favorable a basis with the new company as the government claim on the bonds, for the latter had been recognized up to $76,000, and interest from, I think, February, 1860, while there is no evidence that defendant's claim had ever been recognized by the new company, except what is said in the written proposition of May 14, where it is said "any claim you (Ward) may have against the company on account of those bonds."

6. I instruct you that the action for money had and received is an equitable action, and under this form of action the plaintiff may recover for any money which defendant has that in equity and good conscience the government is entitled to demand.

Whereupon the said plaintiff in error prays that the judgment aforesaid, for the errors aforesaid, and for other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held
79 for naught; and that he may be restored to all things that he hath lost by reason of said judgment.

C. I. WALKER,
Attorney for Plaintiff in Error.

(Indorsed:) In the Supreme Court of the United States. Eber B. Ward, plaintiff in error, vs. The United States, defendant in error. Assignment of errors. Filed in clerk's office June 28, 1870. A. Mandell, clerk. C. I. Walker, att'y for pl't'ff in error.

80 Circuit *circuit* of the United States for the eastern district of Michigan.

THE UNITED STATES OF AMERICA }
vs.
EBER B. WARD. }

I, Addison Mandell, clerk of said court, do hereby certify the above and foregoing to be a true copy of the original record of judgment in the above-entitled cause, the same having been carefully compared by me with such original, and is a correct transcript therefrom, and of the whole of such original record; and also the original bill of exceptions and assignment of errors filed in said cause.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court at Detroit, this fourteenth day of September, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fifth.

[SEAL.] ADDISON MANDELL, *Clerk.*

(Indorsement on cover:) No. 488. Eber B. Ward, plaintiff in error, vs. The United States. Michigan C. C. U. S.
Filed 10th October, 1870.

SUPREME COURT OF THE UNITED STATES:

DECEMBER TERM, A. D. 1870.

EBER B. WARD, Plaintiff in Error,

vs.

THE UNITED STATES, Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This was an action for money had and received, brought by the United States, the plaintiffs below, against the plaintiff in error who was defendant below, and for perspicuity in discussion the parties will be spoken of as they stood in the Court below—the United States as plaintiff and Mr. Ward as defendant.

There were several requests to charge based upon what the testimony did or did not tend to show.

The entire testimony is contained in the Bill of exceptions. There is no contradiction in that testimony and the facts though complicated are clear and indisputable.

The following statement shows those facts in the order of their occurrence.

STATEMENT OF FACTS.

1. In 1856, the Detroit and Milwaukee Rail Way Company was a corporation doing business in the State of Michigan. Their road was subject to two mortgages executed in April 1853, to secure bonds to the amount of three and a half millions of dollars, and the company was then in an embarrassed condition, and subsequently became utterly insolvent.

Case, folios. 33, 34.

2. It seems that the Company were desirous of getting possession of, and using a quantity of Railroad iron imported by them, without, at that time, paying the duty thereon, and this was to be accomplished by executing with sureties certain Re-warehousing bonds for said iron,

Case, folios 19, 24.

3. In December 1856, ten of the bonds were executed, amounting to $18,892 20.

Case, folio 29.

4. On the 19th of May three other bonds were executed, amounting to $10,877 50, on which N. P. Stewart and J. P. Whitmore became sureties.

Case, folio 29.

5. Evidently finding it difficult to obtain sureties for this purpose, on the 22d of May, 1857, the Company by resolution proposed to pay $10,000 per annum

to any person or persons who would furnish the required surety.

Case, folios. 24, 60.

6. Under this resolution from June 1, 1857, to December 27, 1858, nineteen other bonds were executed, amounting to $104,538,89, on which the defendant, Ward, was a surety with N. P. Stewart, and in some cases with others.

Case, folio 29.

7. In January 1858, and soon after, the Railway Company executed two other mortgages upon their Road, amounting to $1,250,000, called third and fourth mortgages.

Case, folio 14.

8. In October 1859, and as said bonds fell due, the Solicitor of the Treasury, directed a suit thereon, but none was commenced. On the contrary there was "an agreement of extension" and payments were made thereunder.

Case, folio 17.

9. This agreement to extend was made not only without the assent of the defendant as surety, but against his earnest protest made in March 1860.

Case, folios 43.

10. On the 7th of April a bill was filed in the

Circuit Court of the United States to foreclose said third and fourth mortgages.

Case, folios 16.

11. A law of the State of Michigan approved February 10, 1859, authorized purchasers under a foreclosure of railway mortgages to organize a new corporation which should have the rights, franchises and powers of the old corporation, but be free from its obligations.

Case, folios 14, 15.
Session Laws, 1859, page 262.

12. In anticipation of such purchase of the property by the mortgagees and a re-organization, the parties to said foreclosure, viz: the mortgagors, (the Railway Company,) and the mortgagees, entered into a stipulation in said cause, which provided, among other things, that the new corporation thus to be organized would issue their evidences of debt to certain creditors of the Railway Company, whose claims are mentioned in Schedule B, payable in as short a time as the earnings of the road would warrant, and among the claims described in said schedule is; "The amount due, under the resolution of the Company, of date May 22, 1857, to persons who became sureties for the Company for duties due on iron to the Federal Government as specified in said resolution."

Also "All sums due the Federal Government for duties upon railroad iron and which now amount to about the sum of $94,000."

13. On the 17th of the same August (1860) the Railway Company procured an *exparte* award, fixing the

amount of the defendant's claim under said resolution at $16,000. The defendant knew nothing of this award, and never accepted it. On the contrary, his claim was a general one. He was the only solvent surety, and claimed the whole $10,000 per annum, while the bonds had been running,

Case, folios 24-6, 52, 32.

14. Under said foreclosure suit, the mortgaged property was sold and, as was contemplated, was purchased in the interest of the mortgagees, in the name of their Solicitor, Mr. Gray, and of one of the mortgagees, and there was an organization under the statute, October 21st A. D. 1860. The new organization assumed the name of the Detroit & Milwaukee Railroad Company and took possession of the property.

Case, folio 16.

15. On the 15th day of November 1861, the new organization executed a mortgage in trust, to secure the payment of certain deferred coupons due under the mortgages of 1855, and for other purposes, and it provided that the net earnings of the road should be applied to the payment of certain expenses and interest and then to the payment of the debts of the Railway Company to the amount of $500,000, including the duties due to the Government of the United States.

Case, folios 33, 43.

This mortgage as far as it was any security secured

the debt due to defendant as well as that due to the Government. It was a debt of the Rail*way* Company.

16. The new organization, the Railroad Company, entered upon their books, as due on these bonds, $76,000, as a claim which they expected to pay, but they acknowledged no legal liability thereon.

Case, folios 31-2.

17. The Company also informally recognized the claim of the defendant as one which they expected to pay, but they had not formally recognized it, or put it upon their books.

18. In the spring of 1863, when the negotiations commenced, out of which the present litigation has grown, the position of the parties was as follows:

a. The Rail*way* Company was utterly insolvent, and all its property had, under the foreclosure sale, gone into the possession and control of the Rail*road* Company.

Case, folio 16.

b. The Government held the bonds referred to, on which they claimed that there was due $94,000, without interest, while it was admitted that there was unpaid thereon $76,000.

Case, folio 13.

c. The defendant was the only solvent party upon the bonds, and he claimed that he had been discharged by an agreement for an extension of time and by other matters.

d. Defendant had a claim against the Rail*way* Com-

pany which they recognized and provided for in their stipulation in the foreclosure suit in the same way that they did for the claim of the Government against them.

The *amount* of said claim was an open question—the Railway Company recognizing it at $16,000; the defendant claiming a much larger sum.

e. The new organization, the Railroad Company, had secured each to the same extent, in accordance with the stipulation of August 4, 1860, by the trust mortgage—although of this mortgage neither the plaintiff or the defendant knew anything.

f. They had also recognized both demands as claims which they expected to pay, but they acknowledged no legal liability thereon.

19. In the spring of 1863, and before any action on the part of defendant, the attorney of the said Railroad Company, H. H. Emmons, Esq., called on the plaintiff's attorney, suggested some difficulties that plaintiff would have in recovering on said bonds and expressed a willingness to advise a compromise at $20,000.

Case, folio 8.

20. After this, in April 1863, defendant called on the Board of Directors of the Railroad Company, for a proposition to compromise said bonds and his own claim. No proposition was *then* made.

Case, folios 17, 18.

21. But doubtless anticipating such a proposition defendant *then* called upon plaintiff's attorney and stat-

ed that he had been urging the Directors to do something and he thought they would; and he then offered to pay $35,000 for said bonds, saying that whether the Company furnished any money or not, as he expected they would, he would pay that sum out of his own funds.

Case, folios 18-9.

He stated some facts and reasons why he thought the plaintiffs could not recover. It is not claimed that any mis-representations were made.

Case, folio 19.

22. After this, in April, the Board of Directors through Mr. Trowbridge *verbally* made the proposition to defendant which was afterwards, on the 14th of May, reduced to writing.

Case, folios 17, 18, 31.

23. On the 13th of May the plaintiff's attorney communicated to the solicitor of the Treasury the offer of the defendant to pay $35,000. He then knew nothing of the proposition of the Railroad Company to the defendant or of the mortgage of November 15th, 1861, nor did he know these facts until long after the compromise was effected.

Case, folio 20.

24. On the 14th of May the verbal proposition

previously made to the defendant by the Railroad Company was reduced to writing and is as follows:

"DETROIT & MILWAUKEE, R. R. Co.,
DETROIT, May 14, 1863.

CAPTAIN E. B. WARD.

My Dear Sir.—Referring to the conversation we have had on the subject of the duty bonds due the United States, I am authorized to say that if you can procure the settlement and cancelling of them for a sum not exceeding eighty thousand dollars currency, that sum to include your services and any claim you may have against the Company on account of those bonds, this Company is ready to pay, and will pay that sum, one half, on your making the arrangement with the Government, and the other half within thirty days thereafter.

This offer, however, not to be considered as waiving any defence the Company has to said bonds and claims.

Yours truly,

C. C. TROWBRIDGE, *President.*"

There is no evidence that this proposition varies in the slightest degree from the verbal proposition. On the contrary the plaintiff's evidence proves it to be the same.

Case, folios 17, 18, 31.

25. In July following it was arranged between defendant and plaintiff's attorney that the bonds should be delivered to defendant on his depositing the $35,000 with the plaintiff's attorney in pledge for the return of the bonds if the Secretary of the Treasury did not authorize the compromise, and on the 24th of July the money was

deposited and the bonds, uncancelled, delivered to defendant.

Case, folio 21.

26. On the 27th of July the defendant delivered to the Railroad Company the said bonds uncancelled and received the eighty thousand dollars according to said proposition of May 14th, giving them a receipt therefor as paid for bonds which he had paid by compromise and for which he had been paid according to the agreement, and in full of all claims against the Company.

Case, folios 21-3.

27. On the 29th of July 1863, the Secretary of the Treasury authorized the compromise as proposed, and the plaintiffs attorney paid the $35,000 into the treasury and officially notified the defendant and the Railroad Company of the compromise.

Case, folio 23.

27. On the 1st of February 1864 the plaintiff's attorney having learned of the payment of said $80,000 to defendant, demanded of defendant that he pay over forty-five thousand dollars, being the balance of the eighty thousand dollars, over and above the thirty-five thousand dollars already paid.

Case, folios 26-7.

28. February 3d, the defendant called on plaintiff's attorney and insisted that said compromise was entirely

Thus & hereto follows page 19

II.—*a*.

But upon the plaintiff's own theory as to what the arrangement between the defendant and the Railroad Company was, under which defendant received the $80,000, the plaintiff was not entitled to a verdict.

That theory was, that he received it, and the whole of it, to be paid to the plaintiff for a settlement of these bonds.

And the Court charged that, if the jury so found, the plaintiff was entitled to recover the whole sum of $80,000, less the $35,000 already paid.

Charge, folio 66.

This we submit is clearly erroneous.

Upon this theory, the money belonged to the Railroad Company when it was paid over to defendant. He received it to pay to the plaintiff, but his undertaking to do so was solely with the Railroad Company. He made no promise, express or implied, to the plaintiff. On the contrary it agreed with him to give up the bonds on the payment of $35,000, and this rebuts any possible implication of a promise to pay a further sum.

It is, therefore, a case where one man receives money of another to pay to a third, and where there is no privity between the bearer of the money and the third person to whom it is to be paid.

Undoubtedly, if he fail to pay it over, the one who paid it to him may recover the money. It is the common case of money put into the hands of an agent for a special purpose, and not used for that purpose. If the agent lose it, or squander it, or is insolvent, the loss is *his*, and not that of the third person, to whom it was to be paid. *He* has assumed no responsibility in relation to it, and may not even know of the transaction. If sent to pay a claim or debt against the sender,

that debt still exists; and until the money is paid over the principal may revoke the agency.

Upon what principle then can the third person bring an action against the bearer of the money? Where is the privity of contract?

It is admitted that, in violation of all principle and as an exception to the general rule, there are many dicta and some decisions that authorize an action in just such cases. But the clear weight of modern authority is the other way.

Chitty on Contracts, 684–6.
Williams vs. Everett, 14 East., 582.
Baron vs. Husband, 5 B. & Ad., 613.
Malcolm vs. Scott, 5 Ex., 601.
Brind vs. Hampshire, 1 M. & W., 365.
Barlow vs. Brown, 16 M. & W., 126.
Scamon vs. Whitney, 24 Wend., 260.
Crampton vs. Ballard, 10 Vt., 251.

These cases approved in

Casey vs. Curtis, 3 How., 248–9.

If there has been a promise made to the third person to pay over the money, it is otherwise. The privity then exists.

Wyman vs. Smith, 2 Sandf. S. C., 331.

We submit, therefore, even if the evidence tended to prove the plaintiff's theory, it was not entitled to a verdict.

fair, that he was under no obligation legal or moral to pay anything more, but that since making the same he had learned for the first time of said mortgage of November 15th 1860, which put plaintiff's claim upon a better basis than it before stood upon, or than at the time he supposed it had, and with reference to that, and that alone, he was willing to give them a check for $22,028, payable in twelve days from date, which defendant said was doing better for the plaintiffs than he did for himself, it being 75 per cent. of the amount admitted to be due.

Case, folios 27-8, 51-2, 45.

29. It doubtless afterward occurred to the defendant that he had taken no discharge from the plaintiffs and that they were still at liberty to sue him for the balance of the $80,000, and he stopped the payment of the check, but caused an intimation to be made to plaintiff's attorney that if all claims for a further sum should be relinquished he would pay the check, but this proposition was rejected by the plaintiff.

Case, folios 27-8, 45-6.

29. Defendant then proposed to plaintiff's attorney and to the Special Agent of the Treasury Department, that if the plaintiffs would return to him the $35,000 paid he would return to the plaintiff the bonds uncancelled.

Case, folio 44.

On this state of facts the plaintiffs have brought this

action—not for the fraud—not to recover the bonds or their value, but for money had and received.

The plaintiff claimed to recover of defendant the sum of $45,000 being the difference betwen the $80-000, received by him of the Railroad Company, and the $35,000 paid them by him.

It becomes material to enquire under what arrangement and for what purpose the money was paid to the defendant by the Railroad Company.

The defendant contends it was paid under the proposition of May 14th 1863.

The court left it to the jury to say whether it was paid under this proposition, or under some other proposition and arrangement, and, if under some other, what that was.

I.

THERE WAS NO EVIDENCE TENDING IN THE LEAST DEGREE TO PROVE THAT THE $80,000 WAS PAID TO DEFENDANT UNDER ANY OTHER PROPOSITION OR ARRANGEMENT THAN THE WRITTEN ONE OF MAY 14, 1863.

The court was requested to charge:

1. That there was no evidence tending to prove that the verbal proposition, which preceded the written one, was different from the written one.

2. That there was evidence tending to prove that the $80,000 was paid under that written proposition and there was no evidence tending to show that it was paid under any other.

6, 7, 8, requests to charge, folios 54-5.
6, 7, 8, assignment of error, folios 72-3.

The requests were all refused and the court did charge:

1. That there was evidence tending to prove that the written proposition did not evidence fully the terms made by the Railroad Company to defendant.

2. That they were to find from the facts and circumstances what that arrangement was.

Charge, folios 60, 65, 69.
15th and 18th assignments of error, folios 75-7.

The evidence, and all the evidence as to what this proposition or arrangement was, is very brief, and entirely uncontradicted, and it was all introduced by the plaintiffs.

It is as follows:—

"That in said April 1863, the Board of Directors of said Rail Road Company was applied to by the defendant verbally, to make the proposition of compromise of said bonds which was put in writing by the President on the 14th of May, as follows:—

"DETROIT & MILWAUKEE R. R. Co.

DETROIT, May 14th, 1863.

CAPT. E. B. WARD,

My Dear Sir.—Referring to the conversation we have had on the subject of the duty bonds, due to the United States, I am authorized to say that if you can procure the settlement and cancelling of them, for a sum, not exceeding $80,000, currency, that sum to include your services, and any claim you may have against the Company on account of those bonds, this Company is ready to pay and will pay that sum—one

half on your making the arrangement with the government, and the other half within thirty days thereafter. This offer, however, not to be considered as waiving any defence the Company has to said bonds and claims.

Yours truly,

C. C. TROWBRIDGE, *President.*"

And that, subsequently, in April, said board *did verbally make the said proposition.*

Stipulation, folios 17 and 18.

Mr. Trowbridge testified as follows:

"He heard no conversation about the defendant's proposition to the Railroad Company, or of the fact of his having solicited a proposition from it, until after it occurred, and that he received his first information of such proposition from Mr. Brydges, managing Director, or from Mr. Emmons, Counsel for the Railroad Company. That after receiving such information, and before writing said letter, defendant asked him (witness) what the Board decided as to his proposition, and witness in reply then repeated orally, to defendant, *the* proposition as he understood it, and that said proposition as witness understood it, and as he represented it to said defendant, as above stated, *was fully expressed in the said letter of May 14th.*"

Case, folios 30-31.

In the papers which passed at the time the money was paid, an agreement is referred to, between the defendant and the Railroad Company, and the money is

acknowledged to be paid, and to be received, not only in full, for the bonds compromised with the United States, but of all claims and demands which the defendants had against the Detroit & Milwaukee Company.

Case, folios 22-23.

It is evident from this, that the defendant did not personally change the terms of the original proposition, or obtain terms more favorable to himself, by including his own claim, after the original proposition had been made. There is not a scintilla of evidence that tends to show that the original verbal proposition differed from the written one. *It* was *the* proposition of compromise of said bonds which was put in writing by the President, on the 14th of May, for which the defendant, verbally applied, in April, and no other or different one, and it was "said proposition" that is embodied in the written proposition. which the Board did verbally make to said defendant subsequently to his application for the proposition from the Railroad Company.

Language could not more clearly express that both the verbal and the written proposition were identical in their terms.

Whether there was evidence tending to prove that the original verbal proposition was different from the written proposition was a question of vital importance.

This under the charge of the Court was the hinge upon which the controversy turned.

We have shown that there was no such evidence. The refusal to charge as requested, and the charge as given, in the language of this Court in another

case, "could hardly fail to mislead and confuse. It permitted them (the jury) to substitute conjecture for deduction, and opened a field beyond the sphere of the case where the means of error were abundant."

Blackburn vs. Crawford, 3 Wallace, 194.
Chandler vs. Van Roeder, 24 How. 226.

But whatever may have been the character of the verbal proposition made before the money was paid over, there is *no* evidence tending to show that it *was actually paid over* to defendant upon any other proposition than that of May 14, or for any other purpose than that mentioned therein.

The money was paid to defendant after that proposition and under it and in this action for money had and received, the plaintiff's right must depend entirely upon the purpose for which the money was actually paid over, no matter what proposition had previously been made, and which had been superceded by the written one.

If not paid over *to be paid to plaintiffs*, or under such circumstances that the very money thus paid became the property of the plaintiffs, they cannot recover.

The Court therefore erred both in its refusal to charge, and also in its charges upon this point.

II

THE COURT ERRED IN REFUSING TO GIVE THE CONSTRUCTION TO THE WRITTEN PROPOSITION OR CONTRACT OF MAY 14TH, REQUESTED, AND IN REFUSING TO GIVE ANY CONSTRUCTION THERETO.

9 and 10 requests to charge, folio 56.
9 and 10 Assignments of Error, folios 72-73.
Charge of Court, folio 67.
18th Assignment of Error, folio 18.

1. According to the very theory of the charge of the Court, the jury were at liberty to, and might well have found, that the proposition or arrangement under which the defendant received the $80,000 was the written one of May 14th. On that hypothesis, it was clearly the duty of the Court to give construction to this written instrument.

2 Parsons on Contracts, 49—(note).

There was error in refusing to give such construction, and very vital error. It left the jury to give any construction they saw fit to this most important instrument, upon which the rights of the parties turned.

Cases Ante.

The defendant was entitled to the charge requested in relation to this instrument.

a. That it did not, as was claimed by plaintiffs, constitute defendant the Agent of the Railroad Company, to pay over to the plaintiffs any given sum, but he was at liberty to make any arrangement he saw fit with plaintiffs, for a settlement and cancellation of the bonds held by them.

b. That if the jury found that the $80,000 was paid to defendant under said proposition, the plaintiffs were not entitled to recover as it was not paid to him for the use of the plaintiffs, but to pay him in full for his own services and claims, and for procuring the settlement and cancellation of the bonds, held by the plaintiffs, and for the delivery of the same to the Railroad Company.

This instrument is, like any other, to be read in the light of surrounding circumstances.

1 Greenleafs Ev., Sec. 275.
2 Parsons on Contracts 549-557.
Nash vs. Towne, 5 Wall, 689-699.

Fowler on Con 123

The Railroad Company were not the original debtors. They had not assumed the debt due to plaintiffs. They had executed a mortgage that provided for its payment out of the earnings of the Road, after the payment of various other matters.

They expected, in some way, and at some time, to pay this debt, whatever its true amount was, but they denied any legal liability therefor. They had entered it upon their books.

They stood in precisely the same relation to the claim of the defendant as they did to that of the plaintiffs, except as to the one particular of entering it upon their books.

The defendant held this claim, and was urging the Directors to do something in relation to it. His name was upon nineteen of these bonds held by the plaintiffs, and while he denied his liability he was anxious to have this claim as well as his own arranged so that no further claim, valid or invalid, could be made upon him in relation thereto.

Each party was in a position, where a compromise was desirable, and under these circumstances the defendant obtained the proposition, and it is to be read in the light which they furnish. The light thus furnished is in perfect harmony with the language of the instrument itself, which seems too clear to require construction.

Neither the $80,000, nor any given portion thereof, was by the terms of the proposition to be paid over to the plaintiffs. The two claims far exceeded the proposed sum; indeed that of the plaintiffs alone did so, it being $94,000 and interest.

A compromise was contemplated not of one, but of both these claims, and to effect this compromise of both claims, the Railroad Company were willing to pay $80,000, and they proposed to defendant that if he would discharge his own claim and procure a settlement and cancellation of that of the plaintiffs, they would pay him $80,000.

He was entirely at liberty to make the best bargain with the plaintiffs that he could; to pay them in cash or to get time, or to pay in anything else that the plaintiffs would receive.

All that the Railroad Company required, all that their interests demanded them to require, was the discharge of the two claims. The $80,000 was to be paid in one entire sum for this double purpose, not a part, proportionate or otherwise, to apply on the claim of each.

They may have expected that it would have cost the defendant more than it did to take up the bonds held by the plaintiff, but that expectation, if proved, would have nothing to do with the construction of the paper. That, as we have said, leaves him at liberty to make the best bargain he could with plaintiffs, and he was to have for himself all that remained be it more or less. In other words, the money was not to be, and was not, paid over to the defendant to pay to the United States, but to liquidate these two claims so that they should be no longer outstanding.

See Pages 10-11 for II a

III.

THE COURT ERRED IN REFUSING TO CHARGE THE JURY, AS REQUESTED, THAT THE RAILROAD COMPANY WERE NOT LEGALLY LIABLE TO PLAINTIFFS ON SAID BONDS.

1 Request, folio 52.
1 Assn't of Error, folio 70.

Under the charge as given, viz : that there was evidence tending to show that the money paid to defendant by the Railroad Company was paid under some other proposition or agreement than that embodied in the written proposition of May 14, and in determining what that was, they were to consider all the circumstances of the case,—it became important to determine just the nature of the plaintiff's claim against the Railroad Company, and also as against the defendant; and also the nature and validity of the defendant's claim against both the Railway Company, and the Railroad Company, as these were important facts and circumstances to be considered by the jury in determining what the arrangement would naturally be between the parties, and what it was.

The defendant requested the Court to charge the jury that there was no evidence tending to prove that the Railroad Company were legally liable to the plaintiffs to pay the bonds in question and this was refused.

The act under which the Railroad Company was organized, expressly exempted them from all debts and obligations of the old organization.

Session Laws, 1859, folio 253.

The only facts that were in evidence having the slightest bearing on the question of such liability are;

1. The stipulation in the foreclosure suit, between the solicitors of the mortgagee and the Railway Company, that the new organization should issue its notes or other evidences of debt to pay the claim of the plaintiffs and others.

Case folios 48 and 49.

This was not a stipulation to which the Railroad Company was a party, or by which it could be bound, nor did they ever act upon it, or, so far as appears, know of it.

2. The provision in the mortgage by which, in a certain contingency, they were to apply the earnings of the Road, to this and other debts.

Case folio 38.

This mortgage was a lien upon the Road, to secure this application, but it did not obligate the Railroad Company to pay this debt, but only to apply certain funds to this purpose, if they should exist. It did not, therefore, create a legal liability to pay to plaintiffs the bonds in question; nor were the plaintiffs parties to said mortgage, or in privity therewith.

3. The Railroad Company had paid $6,000 on the bonds to plaintiffs.

Case folio 17.

This created no liability to pay any further sum.

4. The Railroad Company had entered upon their

books as due upon these bonds, $76,000 as a claim which was *expected* to be paid, though they acknowledged no legal liability thereon.

Case folio 32.

This proceeding, whatever it was, created no legal liability that did not before exist.

These are all the facts which in the slightest degree tend to show such legal liability. No promise to the Railroad Company to pay this indebtedness is pretended, and we submit that they could not legally assume such liability, if they desired to.

Bank of Genesee, vs. Patchin Bank, 3 Kern., 314.
Madison vs Watertown, Plank Road Co., 7 Wisconsin, 59.

We insist therefore, that there was error in this refusal to charge.

IV.

THE COURT ERRED IN REFUSING TO CHARGE, AS REQUESTED, AS TO THE CHARACTER, THE VALIDITY AND THE EXTENT OF DEFENDANT'S CLAIM, AND IN THE CHARGES IN RELATION THERETO.

3, 4, 5 Requests, folios 53 to 55.
3, 4, 5 Assignments of Error, folio 71, 72.
Charge of Court, folio 67.
19 Assignment of Error, folio 78.

It was important, under the charge given by the Court, that the jury should understand defendant's claim to be a valid one, and one that the Railroad Company

expected to pay, and that it was every way as meritorious as the claim of the plaintiffs upon the bonds held by them.

The defendant requested the Court to charge:

1. That the testimony tended to prove that the defendant had a valid claim against the Railway Company, and that the Railroad Company recognized it as one of the claims which they expected to pay.

This was refused, and exceptions were taken.

The evidence tended to prove as requested. The original resolution of the Company of May 22, 1857, proposed to pay any person or persons who would furnish security to the bonds to be executed to the plaintiffs, a compensation of ten thousand dollars per annum as a commission.

Case folio 24.

The defendant executed nineteen of these bonds amounting to $104,558.87 as surety for the Railway Company, after and under said resolution.

Case folio 28.

The stipulation of the Railway Company with the complainants in the foreclosure suit of August 4, 1860, provided for the payment of the claims under this resolution.

Case folio 50.

The act of the Railway Company in an *ex-parte* settlement of the amount of the claim of the defend-

ant was a clear recognition of its validity under the resolution referred to.

Case folio 25, 26.

Here certainly is testimony tending to prove the validity of this claim against the Railway Company.

So the testimony clearly tends to prove that the Railroad Company recognized this claim as one which they expected to pay. Thus Mr. Trowbridge testifies "that the claim of the defendant for becoming surety upon said bonds had been informally recognized by the Company, and it was considered among the unsecured debts of the Detroit and Milwaukee Railway Company, which the new company expected to pay, but it had never been put upon the books nor formally recognized."

Case folio 32.

And on cross-examination he admits that the claim was intended to be secured, although, of that he had no certain knowledge.

Then the Railroad Company included this by general description, in the same provision which was made for payment of plaintiff's bonds, and they further recognized this claim when the defendant applied to them for a proposition to pay, or compromise this claim together with that of the plaintiffs upon the bonds.

Case folios 17, 18.

And they again recognized it on the 25th of July, when the money was actually paid over.

Case folios 22, 23.

We say that this charge should have been given.

2. Defendant requested the Court to charge the jury; that the Railroad Company were under the same legal obligation to pay defendants claim as they were the bonds of the plaintiffs. This charge was refused.

The only distinction in the condition of the two claims, so far as the Railroad Company was concerned was this:

The Railroad Company had made a payment on plaintiffs claim, and it was expressly named in the mortgage executed by them, while defendants claim was included in the same paragraph under a general clause, and an entry had been made upon the books of the Railroad Company, as to the amount which was admitted to be due upon these bonds; but there was no admission that it was due from the Railroad Company, nor were the plaintiffs privy to such entry. Neither of these facts, in the slightest degree affected the legal status of plaintiff's claim.

In all other respects they stood alike. Both were valid claims against the Railway Company; both were provided for by the stipulation of August 4; both were included in the mortgage of November 15, 1860; both were recognized by the Railroad Company as valid claims, and they expected to pay both. This charge should have been given.

3. The defendant requested the court to charge that there was no evidence tending to prove that defendant was a party to the award limiting his claim to $16,000, or that he was bound thereby, which was refused.

The amount of defendant's claim as compared with that of the plaintiff's was under the charge of the court, an important fact in enabling them to *guess* what the arrangement was, between the defendant and the Railroad Company for there was no *evidence* that there was any arrangement other than the written one of May 14th. The defendant was therefore entitled to the charge requested.

The award in question shows that it was entirely *exparte.*

Case, folio 25.

And there is no further testimony upon the subject

4 The court, not content with refusing these charges, attempts to prejudice the jury against defendant's claim by making an unwarrantable charge in relation thereto, namely, that it did not rest on as favorable a basis as the claim of the plaintiffs, which had been recognized by the Railroad Company up to $76,000, *and interest,* while it was said that there was no evidence that defendants claim had been recognized by the Company, except what is said in the written proposition of May 14th.

We have already shown that the Railroad Company had in other ways recognized this claim of defendants as one which they expected to pay. Nor is it true that the Railroad Company had recognized a claim of interest, in favor of the plaintiffs, or that they recognized any sum as a debt due from them. The charge was calculated to prejudice the defendant's case.

V.

THE COURT ERRED IN REFUSING TO CHARGE AS REQUESTED AS TO THE DUTY OF DEFENDANT'S DISCLOSING TO PLAINTIFF, THE PROPOSITIONS MADE TO HIM BY THE RAILROAD COMPANY, AND IN THE CHARGE UPON THAT SUBJECT.

12 request, folio 57.
12 assignment of error, folio 74.
Charge of error, folio 65.
16 assignment of error, folio 76.

There is in this case no evidence tending to show any misrepresentation upon the part of the defendant. At the time of his interview with plaintiff's attorney he had solicited a proposition from the Railroad Company, for a compromise, and subsequently, but before any arrangement with plaintiff was completed, he had received this proposition and knew just what the Railroad Company promised to do in the matter. This knowledge he did not communicate, although he did inform him that he had had an interview with the Railroad Company upon that subject, and had urged them to make some arrangement and expected that they would.

Now it is very probable that if plaintiffs attorney had known just what defendant was to receive from the Railroad Company, that plaintiffs would have declined taking the $35,000 in compromise for their bonds. They might have said defendant was getting a larger percentage upon his claim than they were. and that he was making too good a bargain for himself.

The defendant requested the Court to charge that he

was under no obligations to disclose said proposition, and not disclosing it was no evidence of fraud.

The Court refused thus to charge, and did charge that the defendant was bound to disclose whatever information he possessed not accessible alike to both parties, which would materially affect or influence the decision of plaintiffs in accepting the offer of $35,000.

Charge folios. 65-66.

We claim that this refusal and this charge was clear error, and that the law does not recognize or enforce any such duty of disclosure in the ordinary business transactions between man and man.

Beyond all questions there are concealments which, if material in their character, are fraudulent. Thus in case of family settlements, or where a peculiar fiduciary relation exists, or where especial confidence is reposed, concealments of material facts are fraudulent.

1 Story's Equity 219-212.

And in contracts for insurance, especially marine insurance, there is ordinarily the same duty of disclosure.

2 Parsons on Contracts, 402.
Clarke vs. Manufacturing Ins. Co., 8 Howard, 249.

And it has sometimes been said that the same obligations of disclosure exist between a creditor and a surety, and that a creditor is bound to disclose to the surety any fact which may affect his risk; but this clearly is not law.

Lee vs. Jones, 17 Commons, Bench N. S. 482.
Hamilton vs. Watson, 12 Clarke and Finley, 109.
Vanartsdale vs. Howard, 5 Alabama, 592.

But these cases are exceptional cases, and as a general rule there is no such duty of disclosure, either in contracts of sale or other contracts.

Thus, a purchaser is not bound to disclose a fact exclusively within his own knowledge, in relation to property which he is about to purchase whether such fact be intrinsic or extrinsic, as a mine, or as some external fact, as a treaty of peace, or a declaration of war.

1 Story's Equity, Sec. 147-148.
Fox vs. Macreath, 2 Browns Chan, 420.
Hays vs. Tyson, 24 Penna, 359.
Laidlaw vs. Organ, 2 Wheaton 178.
2 Kent's Commentaries, 483-484.

So, if one convey a defective title to real estate, without fraud or warranty, he is not liable for failure to disclose.

Kerr vs. Cushman, 7 Pa. State, 486.
Dorsey vs. Jackman, 1 S. and M., 50.

So, one in purchasing real estate is not bound to disclose to the vendor that a deed which apparently lessens the value of the vendor's title is fraudulent.

Kintzing vs. McElrath, 5 Barr, 467.

Or that there were more acres in a farm than the vendor supposed.

Echelberger vs. Barnity, 1 Yeats, 302.

Or a vendee that the sheep which the vendor sup-

posed to be lost, and which the vendee is purchasing have been found.

Beats vs. Sheldon, 14 Barbour, 66.

So, under ordinary circumstances, a purchaser seeking to buy goods on credit is not bound to disclose his own insolvency.

Cross vs. Peters, 1 Greenleaf, 378.
Smith vs. Smith, 21 Penna. State, 367.
Nichols vs. Perrin, 18 New York, 294.

So in a treaty for a compromise one is not bound to disclose to the other the repeal of a statute seriously affecting the rights of the parties.

Shank vs. Shoemaker, 18 N. Y., 489.

So one is not bound to disclose an extrinsic fact like peace or war.

Laidlaw vs. Organ, 2 Wheat, 178.
2 Kents Com., 483-4.

And even in insurance cases a party is not bound to disclose facts not enquired about, unless such facts are unusual.

Clarke vs. Manufacturing Ins. Co., 8 Howard, 248.

Many other cases might be cited of a similar character. To make the want of disclosure fraudulent there

must be *an obligation to disclose*, and this exists only under peculiar circumstances.

1 Story's Equity, 147, 148, 204, 207.
1 Hilliard on Vendors, 345.
2 Parsons on Contracts, 776, 778, and notes.
Irving vs. Kilpatrick, 3 Eng. Law and Eq., 17-34.
Otis vs. Raymond, 3 Conn., 413.
Barnet vs. Stanton, 2 Alabama, 187.

In the case under consideration there was no fiduciary relation between the plaintiffs and the defendant, nor did any special confidence exist. The defendant was treating the plaintiffs at arms length and the plaintiffs were claiming to hold him liable on certain bonds, the validity of which as against himself he disputed, and yet which he desired to have compromised and taken up. The defendant was bound to disclose nothing. A simple concealment was no cause of complaint; but he did in fact disclose that he had been having an interview with the Board of Directors, that he thought they would do something to take up the bonds, and he made an offer, in anticipation of their doing something. When the board proposed to him, he did not seek another interview and disclose the fact of this offer, but he had already opened to the plaintiff the means of information. They could have made enquiries of the Board of Directors and ascertained what they were willing to do or had proposed to do.

To hold that the defendant was bound to disclose is to hold that one can never compromise a claim for himself or others without disclosing every fact which induces him to seek a compromise. If disclosure is a duty it must be full and complete; if his defence is weak he must

expose to his adversary every weak point; if he is poor and expects a legacy he must disclose such expectation; if he has discovered that the claim against him is stronger in fact or in law than the claimant supposes, he must disclose to him all that makes it thus strong. We submit that any such rule is utterly at variance both with the established rules of business and the settled rules of law.

VI.

IN CONNECTION WITH THIS SUBJECT OF FRAUD AND BEARING UPON THE VALIDITY OF PLAINTIFF'S CLAIM THE COURT ERRED IN REFUSING TO CHARGE AS REQUESTED, NAMELY; THAT THE EVIDENCE TENDED TO SHOW THAT THERE WAS A REASONABLE DOUBT THAT THE SURETIES UPON THE BONDS HAD BEEN DISCHARGED AND THAT THE STATEMENTS OF DEFENDANT THAT SUCH DOUBTS EXISTED, WERE NOT EVIDENCE OF FRAUD.

13 Request to charge, folio 58.
13 Assignment of error, folio 74.

The evidence tends to show an agreement to extend the time to the principal without the assent of the sureties, and against their protest.

Case, folios 17, 43, 44.

Such an extension discharges the surety.

Strong, vs. Bank of Mt. Pleasant.
10 Peters, 257.

When the plaintiffs prove an agreement for an extension and that payments were made from time thereunder it will be presumed, as against plaintiffs, that it was a valid agreement for a definite or at least a reasonable time.

Mapes vs. Sidney, Cro. Jac. 683.
Caldwell vs. Halthra, 9, W. and S. 53.

Then too, the sureties remonstrated against any delay in the commencement of suits on the bonds, and this while the principal, the Railway Company, were still in possession of their property, since which time they have become insolvent. This according to some authorities, discharges the sureties.

Pain vs. Packard 13, Johnson 174.
King vs. Baldwin 17, Johnson 384.
Remson vs. Beakman 25, N. Y. 552.

At least here was testimony tending to prove a reasonable doubt as to whether the sureties upon said bonds were not discharged. It follows therefore, that the statement of the defendant that such debts existed, was not evidence of fraud.

VII.

THE COURT ERRED IN REFUSING TO CHARGE AS REQUESTED, THAT THERE WAS NO TESTIMONY TENDING TO PROVE THAT ANY SPECIFIC PORTION OF THE $80,000, BEYOND THE $35,000 WAS PAID TO DEFENDANT, TO BE PAID TO PLAINTIFFS AND THAT THE PLAINTIFFS COULD NOT RECOVER, UNLESS THE WHOLE $80,000 WAS SPECIFICALLY PAID TO DEFENDANT TO BE PAID TO PLAINTIFFS.

11 and 13 Request to charge, folios 57-8.
11 and 13 Assignment of Error, folios 74-5.

There is no evidence as to the purpose for which the $80,000 was to be paid and was paid, except the written proposition of May 14, and the papers which passed when the money was paid over, on the 25th of July.

Case folios 17, 18, 22, 23.

Neither of these furnish the slightest evidence either that the whole of the $80,000, or any specific portion thereof was to be, or was paid, to defendant to pay over to plaintiffs. This question involves the construction of these papers, which we have already considered and to which consideration we refer. Indeed when the money was paid over, not a dollar of it was ever to be paid to the government, and it must have been so understood both by the Railroad Company and the defendant. It was not money had and received to the plaintiffs use.

VIII.

UNDER THE CIRCUMSTANCES OF THE CASE THE CHARGE OF THE COURT, THAT "THE ACTION FOR MONEY HAD AND RECEIVED IS AN EQUITABLE ACTION, AND UNDER THIS FORM OF ACTION THE PLAINTIFF MAY RECOVER FOR ANY MONEY WHICH DEFENDANT HAS, THAT IN EQUITY AND GOOD CONSCIENCE THE GOVERNMENT IS ENTITLED TO DEMAND," WAS CALCULATED TO MISLEAD THE JURY, AND WAS THEREFORE ERRONEOUS EVEN IF ABSTRACTLY CORRECT.

Charge of Court, folio 68.
20 assignment of errors, folio 78.

The only ground upon which the plaintiffs could claim any legal equity against the defendant, was that the $80,000 or some specific portion thereof was paid to defendant for the plaintiffs or to be paid over to them.

But as this charge was given, it left the jury to guess out, if they could, any moral equities in favor of the plaintiffs.

Thus if they thought that defendant made too good a bargain and obtained a larger percentage upon his own claim than he paid to the plaintiffs upon theirs, they were at liberty to find for the plaintiffs, and this, irrespective of the agreement under which, or the purpose for which the money was paid to the defendant.

So if they thought there was a moral obligation upon the part of the defendant to disclose to plaintiffs how good a bargain he expected to make.

So if they thought that the nature of the defendants claim was less meritorious than that of plaintiff.

It left the whole question to the jury to find a verdict for plaintiff without regard to the issue in the cause, the evidence given or the legal rights of the parties, and taken in connection with the refusal of the court to give a construction to the written proposition of May 14, or to charge as to the utter absence of testimony tending to prove certain points of vital importance, it shows a settled purpose upon the part of the court to evade the proper responsibility resting upon it, and to leave the whole case, law and fact to the jury upon a charge well calculated, if not designed, to prejudice the jury against the defendant.

We confidently ask a reversal of the judgement for these various and manifest errors.

C. I. Walker
Geo. F. Edmunds

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

EBER B. WARD, *Plaintiff in Error*,
vs.
THE UNITED STATES. } No. 68.

In Error to the Circuit Court of the United States for the District of Michigan.

BRIEF FOR THE UNITED STATES.



In the Supreme Court of the United S.

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EBER B. WARD, *Plaintiff in Error*,
vs.
THE UNITED STATES. } No. 68.

In Error to the Circuit Court of the United States for the District of Michigan.

BRIEF FOR THE UNITED STATES.

The bill of exceptions in this case purports to set out the entire testimony given to the jury, together with the whole of the judge's charge, and the points raised for the decision of this court by counsel on the other side, in their brief, are based partly upon exceptions to the refusal of numerous instructions asked for by the defendant below, and partly upon a general exception to the judge's charge.

In regard to the charge, which contains a very full and elaborate discussion of the law and the facts of the case, as no particular part of it, nor any special proposition of law found in it, is excepted to in the bill of exceptions, the exception thereto must for that reason be considered as insufficient, (see Insurance Company *vs.* Boykin, No. 263, December term, 1870,) and the points based thereon as not properly before this court.

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The other exceptions adverted to cover the following instructions asked for in behalf of the defendant and refused by the court below:

1. "That there is no evidence in this case which tends to show that the Detroit and Milwaukee Railroad Company ever became legally liable to the plaintiff to pay the bonds in question.

2. "That the provision in the mortgage in trust of 1860 is simply a covenant upon the part of the trustees to apply the earnings of said road in a certain contingency to the payment of this, together with other indebtedness of the railway company.

3. "There is evidence which tends to prove that the defendant had a valid claim against the railway company, and that the railroad company recognized it as one of the claims which they expected to pay.

4. "That the railroad company were under the same legal obligations to pay the claim of the defendant as they were the bonds held by the plaintiff.

5. "There is no evidence tending to prove that the defendant was a party to the award, limiting his claim to $16,000, or that he was bound by such award.

6. "That the evidence upon the part of the plaintiff tends to show that the $80,000 paid by the railroad company to the defendant was paid under the written proposition of May 14, 1863.

7. "There is no evidence tending to prove that the original verbal proposition referred to in said written proposition was any different from the written one.

8. "There is no evidence tending to prove that said $80,000 was paid over to the defendant for any other purpose than that mentioned in said written proposition.

9. "That the proposition did not constitute the defendant the agent of the company to pay over to the plaintiff the sum of $80,000, or any given sum, but under it

he was at liberty to make any arrangement he saw fit with the plaintiffs for a settlement and cancellation of the bonds held by them.

10. "That if the jury find that said $80,000 was paid to the defendant by the railroad company under said proposition, the plaintiffs are not entitled to recover any portion of the money thus paid to him, as in such case it was not paid to the defendant for the use of the plaintiffs, but to pay him in full for his own services and claims, and for procuring the settlement and cancelling of the bonds held by the plaintiffs, and for the delivery of the same to the railroad company.

11. "And even if the jury find that the defendant was guilty of either fraudulent disclosures or concealments in his negotiations with the plaintiff, and thereby obtained the compromise in question, the plaintiff cannot recover in this action unless they find under the charge of the court that the whole $80,000 was specifically paid to the defendant to pay to plaintiff.

12. "The defendant was under no obligation to disclose to the plaintiff the proposition made to him by the railroad company, and not disclosing said proposition is not, therefore, evidence of fraud.

13. "There is evidence that tends to show that there was a reasonable doubt whether the sureties upon said bonds had not been discharged from their liabilities thereon, and the statements made by defendant to the plaintiff that such doubts existed are not evidence of fraud.

14. "But there is no evidence tending to show that any specific portion of the $80,000, except the $35,000, was paid to the defendant to be paid to the plaintiff." (Printed Record, pp 20, 21, 22.)

The instructions above enumerated as asked for and refused by the court, and to which exceptions were specially taken in the bill of exceptions, are all embraced

in an assignment of errors; but in addition thereto are also included in that asssignment certain instructions which were given to the jury in the charge of the court, and to which there were no exceptions specially taken in the bill of exceptions. (Printed Record, pp. 26 to 29.) The latter instructions, on grounds already stated, are not properly matter upon which error is assignable here. But there is also another ground on which error therein, if any, cannot be taken advantage of, namely: that comprising, as they do, so many distinct propositions contained in the charge, the general exception to the latter, which affords the only foundation for an allegation of error, is of no avail if any one of them is correct; (see Lincoln *vs.* Claflin, 7 Wall., 139;) and the correctness of some of them at least, if not all, is beyond question. The bill of exceptions cannot be enlarged by the assignment of errors.

I.

It is urged in behalf of the plaintiff in error, that the court below erred in refusing the first instruction above mentioned, viz: "That there is no evidence in this case which tends to show that the Detroit and Milwaukee Railroad Company ever became legally liable to the plaintiff to pay the bonds in question." (See brief of counsel for plaintiff in error, p. 20.)

The instruction was properly refused. The facts show that the defendant, Ward, had undertaken to effect a compromise between the plaintiff and a third party

respecting a controverted claim by the former against the latter, and the action proceeded on the ground that, in consummating this undertaking, he had received from said third party money to which the plaintiff was *ex æquo et bono* entitled. Clearly it was not competent for the defendant to set up, as a defence, that the third party referred to never became legally liable to pay the claim mentioned.

Such a defence, as it would seem from the authorities, is not admissible, even where the money sought to be recovered has been paid on an illegal contract. Thus, where A had received money to the use of B, on an illegal agreement between B and C: held, in an action brought by B against A for money had and received, that the latter could not be allowed to set up the illegality of the contract as a defence. And if A receive money of B to the use of C, it may be recovered by C in an action for money had and received, though the consideration on which B paid it be illegal.

Tenant *vs.* Elliott, 1 B. & P., 3.
Farmer *vs.* Russell, *ibid.*, 296.

So an agent, who receives money for the use of his principal, cannot defend an action by the latter for the amount as money received to his use, on the ground that it was paid to him, the agent, by a third party, under an illegal contract between the latter and the plaintiff.

Chitty on Contracts, 687.
Bonsfield *vs.* Wilson, 16 M. & W., 185.
Hastelow *vs.* Jackson, 8 B. & C., 224.

Whenever one man agrees to receive money for the use of another upon consideration executed, however frivolous or void the consideration might have been in respect of the person paying the money, if it were not absolutely immoral or illegal, the person so receiving it cannot be permitted to gainsay his having received it for the use of the other.

Addison on Contracts, 68.

Griffith *vs.* Young, 12 East., 513.

It was, accordingly, immaterial to the issue in this case whether there was or was not evidence tending to show a legal liability to the plaintiff on the claim aforesaid; and the refusal of the court to give an instruction upon matter not pertinent to the issue is so manifestly *not* error, that it is deemed unnecessary to cite authority on the subject.

II.

It is also urged on the other side, that the court below erred in refusing the 3d, 4th, and 5th instructions above enumerated, viz: That "there is evidence which tends to prove that the defendant had a valid claim against the railway company, and that the railroad company recognized it as one of the claims which they expected to pay;" "that the railroad company were under the same legal obligations to pay the claim of the defendant as they were the bonds held by the plaintiff;" and that "there is no evidence tending to prove that the defendant was a party to the award, limiting his claim to

$16,000, or that he was bound by such award." (See brief of counsel for plaintiff in error, p. 22.)

With regard to the first of these instructions, it was obviously just as immaterial to the issue in this case whether there was or was not evidence tending to prove that the defendant had a valid claim against the rail-road company, as whether there was or was not evidence in support of the plaintiff's claim upon the same company; and it was equally unimportant whether or not the evidence showed that the company recognized the defendant's claim as one of those they expected pay. If the defendant received money from the company for the use of the plaintiff, the circumstance that he also had a claim against the company, which the latter acknowledged and expected to pay, would not relieve him from the obligation to pay over to the plaintiff that money; nor could it be set up as a defence to an action brought by the latter to recover the same. Thus, in Hall *vs.* Marston, (17 Mass., 575,) where a debtor sent to his creditor a bill, with request to receive the money thereon, and, after applying a certain part of it toward payment of his own demand, to pay the residue to another creditor, it was held that the creditor, by receiving the money, had accepted an agency, and that, though the money received was less than the amount of his own demand, yet he was answerable to the other creditor for the sum directed to be paid to him. The principle of this case is applicable to the point under consideration.

The next instruction is open to a similar objection. Manifestly, it was of no importance in this case whether the company stood under the same obligation to pay the defendant's claim as to pay the plaintiff's bonds. The issue between the parties did not necessarily involve this question.

And so with respect to the next and last of the instructions here referred to. Whether the defendant was or was not a party to the award mentioned therein, or whether he was or was not bound by such award, can, in no aspect of the case, be regarded as pertinent to the issue between him and the plaintiff.

But it is further objected that the court erred in the charge to the jury concerning the defendant's claim against the company. It appears that, by way of *comment* rather than instruction, the court, on this subject, observed: "We do not regard defendant's claim for becoming surety on the bonds for the old railway company as resting on as favorable basis with the new company as the Government claim on the bonds; for the latter had been recognized up to $76,000 and interest from, I think, February, 1860, while there is no evidence that defendant's claim had ever been recognized by the new company, except what is said in the written proposition of May 14, where it is said, 'any claim (Ward) may have against the company on account of those bonds.'" (Printed Record, p. 25.)

The answer to the objection is, that the particular charge complained of does not appear by the bill of

exceptions to have been excepted to, otherwise than as it may be embraced in the general exception taken to the judge's charge hereinbefore mentioned; and it has been repeatedly held by this court that such general exception is insufficient.

Insurance Companies *vs.* Boykin, *supra.*

However, irrespective of the circumstance just adverted to, the objection cannot prevail; the remarks of the court, as quoted above, being nothing more than comments upon the evidence, and not strictly instructions to the jury. Observations of that nature are understood to be addressed to the jury, merely for their consideration, as the ultimate judges of matters of fact; and are entitled to no more weight or importance than the jury in the exercise of their own judgment choose to give them. They neither are, nor are they understood to be, binding upon them as the true and conclusive exposition of the evidence.

Carver *vs.* Jackson, 4 Peters, 80.

And it has been held that the right of the judge to comment on the evidence adduced upon the trial of a cause before him is not to be questioned; that the exercise of this right is not the subject of exception; that it involves no point of law; that it rests in the sound discretion of the judge; and that the mode of its exercise depends upon his own sense of his judicial responsibility.

Bulkeley *vs.* Keteltas, 4 Sandford, 454.

"As to the comments of the court upon the evidence,

it is almost unnecessary to say, after what was said by this court, in Carver *vs.* Jackson, (4 Peters, 80, 81,) that we have nothing to do with them."

Magniac *vs.* Thompson, 7 Peters, 390.

III.

It is also claimed, in behalf of plaintiff in error, that the court below erred in refusing the 6th, 7th, and 8th instructions above enumerated, viz: "That the evidence on the part of the plaintiff tends to show that the $80,000 paid by the railroad company to the defendant was paid under the written proposition of May 14, 1863;" that "there is no evidence tending to prove that the original verbal proposition referred to in said written proposition was any different from the written one;" and that "there is no evidence tending to prove that said $80,000 was paid over to defendant for any other purpose than that mentioned in said written proposition." (See brief of counsel for plaintiff in error, p. 12.)

The facts given in evidence by the plaintiff, touching the proposition for compromise and the payment of the $80,000, were, in substance, that in April, 1863, the defendant applied to the board of directors of the railroad company to make the proposition of compromise of the bonds, which was reduced to writing on the 14th of May; that subsequently, in April, the board *did verbally make the defendant that proposition;* that in April, after his interview with the board, the defendant called upon plaintiff's attorney, and made an offer to pay to

plaintiff $35,000 in full for said bonds; that then (still in April) the defendant requested said attorney to communicate that offer to the proper department, which the attorney did on the 13th of May, 1863, the day previous to that on which the said proposition was reduced to writing. (Printed Record, pp. 7, 8, 9.)

Trowbridge, who reduced the proposition to writing in the form of a letter addressed to the defendant, testified, in substance, that he heard nothing of the defendant's application to the company until after it occurred, and that his first information respecting the proposition made to the defendant came from the managing director, or from the company's attorney; that after receiving this information, and before writing said letter, he, in response to an inquiry from defendant, repeated orally to the latter the proposition as he understood it, and that *the proposition as he understood it* was fully expressed in said letter. (Printed Record, p. 13.) In his testimony Trowbridge also says that he had been president of the company since May, 1863, and that just before that he was president director, and before that secretary and treasurer, (*ibid*, p. 13;) but it does not positively appear that he filled either of these positions or any other position in the company during April, 1863, when the verbal proposition was made to the defendant by the board of directors.

On the 24th of July, 1863, before the offer, made and communicated to the proper department as aforesaid, was accepted, (the acceptance by the department did not

take place until the 29th,) the defendant obtained from plaintiff's attorney the above-mentioned bonds, agreeing to return them if asked for, and on the following day he delivered them uncancelled to the company and received in return $80,000. The delivery of the bonds was accompanied by a letter from the defendant to the secretary of the company, dated the 25th of July, and an account bearing same date was certified by the secretary and receipted by the defendant. (Printed Record, pp. 9, 10.) Neither the letter nor the account refer specifically to the verbal proposition of the company made in April, 1863, or to the written proposition of May 14, 1863.

Upon the foregoing state of facts, there was certainly nothing which would have justified the court in instructing the jury, as requested, that the evidence tended to show that the money was paid by the company under the written proposition of May 14. On the contrary, the evidence rather tended to show that the verbal proposition, made by the board of directors in April, was in reality the one under which it was paid. Unquestionably that was the proposition upon which the defendant acted in treating with plaintiff's attorney for the compromise, and which the defendant must be presumed from his conduct to have relied upon, and there is no evidence that it was superseded by any other; for it will be observed that the written proposition of May 14 was not put forth as an independent proposition, designed to take the place of the previous verbal propo-

sition, but merely as a memorial of the latter *as it was understood by the writer.* The court, as we think, properly refused the instruction requested.

As to the refusal of the two remaining instructions mentioned, it is submitted that there was no error here. One of these instructions assumes what is not true in point of fact, viz: that the original verbal proposition is referred to in the written proposition. The latter contains no such reference. Hence the court could not, with any sort of propriety, be expected to grant the instruction. The other instruction is equivalent to a positive direction that the evidence tended to prove that the $80,000 was paid for the purpose mentioned in the written proposition, which, unquestionably, it would have been improper to give the jury. There was proof of a verbal proposition, and the evidence, as it would seem, rather conduced to prove that the payment was made under that proposition. Now if the payment was, indeed, thus made, it must have been made for the purpose mentioned in the verbal proposition, and to instruct the jury that it was made for a purpose mentioned in the written proposition would have been manifestly wrong. To have done so, the court would have had to assume as a fact that the purpose expressed in the one was precisely the same as that expressed in the other, which would have been clearly objectionable; for an instruction that *assumes* a fact is erroneous, even though the evidence may tend to prove it; the reason being that the province of the jury is thereby invaded by the court.

Denmead *vs.* Coburn, 15 Md., 29.
McDougald *vs.* Rutherford, 30 Ala., 253.

IV.

Again, it is claimed in behalf of plaintiff in error that the court below erred in refusing the 9th and 10th instructions, above enumerated, viz: "That that [the written] proposition did not constitute the defendant the agent of the company to pay over to the plaintiff the sum of $80,000, or any given sum, but under it he was at liberty to make any arrangement he saw fit with the plaintiff for a settlement and cancellation of the bonds held by them;" and "that if the jury find that said $80,000 was paid to the defendant by the railroad company under said [written] proposition, the plaintiffs are not entitled to recover any portion of the money thus paid to him, as in such case it was not paid to the defendant for the use of the plaintiff, but to pay him in full for his own services and claims, and for procuring the settlement and cancellation of the bonds held by the plaintiff, and for the delivery of the same to the railroad company." (See brief of counsel for plaintiff in error, p. 16.)

The first of these instructions was properly refused, because it entirely ignores a material fact, of which there was evidence, namely, the existence of the verbal proposition, and because it assumes a material fact which was in controversy, namely, that the money was received by the defendant, not under that proposition, but under the written one.

Thomas *vs.* Sternheimer, 29 Md., 268.

Miles *vs.* Douglas, 34 Conn., 393.

Whether the money was received under the one proposition or the other, it was for the jury to say.

So with respect to the other instruction, it takes from the jury the consideration of the inferences of fact to be drawn in case of a finding in accordance with the hypothesis stated therein, and makes the court declare, as an inference of fact in such case, that the money was not paid to the defendant for the use of the plaintiff, &c. It was a disputed fact, and one on which the issue mainly depended, whether the money was so paid or not, and this fact it was proper for the jury alone to determine, upon the evidence submitted.

V.

In lieu of the instructions just adverted to (under III and IV above) the court gave the following:

"You are instructed that it is for the jury to find what the arrangement or proposition was between the railroad company and the defendant, Ward, in reference to a compromise of those bonds, whether there was any other and different proposition than that reduced to writing May 14, 1863, or whether that evidences the precise terms existing between the railroad company and defendant, when defendant opened negotiations with Mr. Russell, attorney for the Government, in April previous. You are at liberty to take into consideration all the facts and circumstances which have been developed by the evidence in determining what the arrangement between the defendant, Ward, and the railroad company was, at the time he made the proposition to the Government, of $35,000, in April, 1863. Upon your finding in that respect depends your verdict. * * * If you find that

the defendant was to receive, and did receive, the $80,000. to be paid to the Government for a settlement and cancelment of these bonds, then the United States is entitled to recover in this action for money had and received the $80,000, deducting the $35,000 which has been paid. On the contrary, if you find that the $80,000, was to be paid, and was paid to defendant, by the railroad company under an arrangement between defendant and the railroad company, by which he was at liberty to make the best compromise he could, and apply any portion of the fund that should remain to his private use, whether in payment of services, and of his claim against the old company for having been surety on the bonds, or otherwise, then the United States is not entitled to recover in this action for money had and received. In other words, the Government can recover in this action for money had and received only when it is established that the $80,000, or some portion of it over the $35,000 already paid, was paid defendant for the United States." (Printed Record, pp. 24, 25.)

These instructions cover all that is pertinent in those which were rejected, and are, besides, free from objection.

VI.

Another point urged in behalf of plaintiff in error is, that the court below erred in refusing the 12th instruction enumerated above, viz: That "the defendant was under no obligation to disclose to the plaintiff the proposition made to him by the railroad company, and not disclosing said proposition is not therefore evidence of fraud." (See brief of counsel for plaintiff in error, p. 27.)

The evidence shows that the defendant first applied to the board of directors of the railroad company, and solicited a proposition of compromise of the bonds held by the plaintiff; that subsequently the board did verbally make the defendant a proposition, to the effect that the company was ready to pay and would pay $80,000 for the settlement and cancellation of the bonds, &c.; and that after his interview with the board the defendant called upon plaintiff's attorney, stated that he had been urging the directors to do something in relation to the bonds, &c., and then made an offer to pay $35,000 in full therefor, &c. There is no doubt that, at the time he made this offer, the defendant was *already in possession of the proposition of the company;* for unless he had previously known what the company were willing to do in the matter, it is not probable that he would have offered so high a figure as $35,000, especially in view of the representations which he then made to the plaintiff's attorney. Thus he represented, among other things calculated to make the case appear a most desperate one, that counsel for the railroad company had given an opinion that the bonds could not be collected, proposing to the company to stand a trial thereon if plaintiff would not accept the comparatively small sum of $20,000 for a compromise, and that the extension of time given the principal, without the consent of the sureties on the bonds, had discharged the latter, &c. But the defendant did not, on the occasion referred to, or on any subsequent occasion prior to the

completion of the compromise, communicate to the plaintiff's attorney the fact that the company had made the proposition mentioned.

Now we submit that the defendant was under an obligation to disclose the proposition made by the company, that the concealment thereof was evidence of fraud, and that consequently there was no error in rejecting the instruction offered.

Under the circumstances of this case, the defendant may be regarded as in some respects the agent of both parties to the compromise of the bonds—that is to say, of the railroad company on the one hand, and of the plaintiff on the other.

Thus, in his interview with the board, he did not solicit any offer looking simply to an adjustment of his own demands upon the company, but a proposition of compromise of the bonds held by the plaintiff; he did not bargain for a sale, or surrender, or transfer of the bonds *by himself* to the company, but asked for and obtained a proposition from the board stating what the company was willing to pay for a compromise and settlement thereof. With whom? obviously with the plaintiff. for there was no other party with whom a compromise was possible. The defendant was not then, or ever afterwards, in a situation to deal with the company as a principal, touching such compromise and settlement, but only as an agent of the opposite party or holder of the bonds.

So, in his interview with the plaintiff's attorney, he

sought to effect, not a sale or assignment of the bonds to himself, or a release of his own liability thereon, but a settlement, by way of compromise, of the claim of the plaintiff upon the bonds *as against the company*. Such settlement necessarily involved a discharge by the plaintiff of the defendant's liability on the bonds, but that circumstance was merely incidental to the main transaction, and did not constitute the defendant a principal in the matter, or render him incapable of sustaining the relation of an agent to the other party to the settlement, namely, the company.

What the defendant undertook to bring about, and actually succeeded in bringing about, was a compromise—not as between himself and the company, nor as between himself and the plaintiff, but as between the company and the plaintiff. In this affair he was their common negotiator, the go-between or mutual agent of both parties. There was, considering the nature of the undertaking, no incompatibility in the office thus assumed by him. It resembled somewhat that of a broker or driver of bargains, whose engagement, as is well described by Domat, (part 1, bk. 1, tit. 17, sec. 1,) is "like to that of a proxy, a factor, or other agent; but with this difference, that the broker being employed by persons who have opposite interests to manage, he is, as it were, agent both for the one and the other, to negotiate the commerce and affair in which he concerns himself. Thus, his engagement is two-fold, and consists in being

faithful to all the parties, in the execution of what every one of them intrusts him with."

There existed, then, such a fiduciary relation between the plaintiff and the defendant as to devolve upon the latter the obligation of making a frank and full disclosure of any fact which might influence the judgment of the former in making the compromise.

1 St. Eq. Jurisprudence, secs. 315, 316 *a*.

Beyond all doubt, if the plaintiff's attorney had been advised of the proposition made by the board, the sum named in which approximated very nearly the full amount claimed, he would have declined to recommend to the proper Department a compromise for so relatively small a sum as $35,000, which is less than half the amount named by the board. Knowledge of that proposition was, therefore, very material to the plaintiff's interest, and the concealment thereof by the defendant, he being bound in conscience and duty to disclose it, amounted to a gross fraud. Besides, there was not only a *suppressio veri* on his part, but the representations actually made by him to plaintiff's attorney respecting the company, to which reference has been made already, were equivalent to a *suggestio falsi*, and constituted an additional element of fraud.

From this point of view, not only does it appear that there was no error in rejecting the instruction referred to, but that what the court actually did charge the jury on the subject was substantially correct, viz:

"I instruct you that defendant, Ward, was in con-

science and equity bound, under the circumstances of the interview, when he offered $35,000 in compromise to the attorney of the Government, to disclose whatever information he possessed, not accessible alike to both parties, which would materially affect or influence the decision of the Government in coming to a conclusion upon the offer of $35,000; so that, if he misrepresented or concealed any material fact which the Government ought to have been informed of, and thereby obtained a surrender of the bonds for a less sum than would have been demanded had the Government been fully advised, the Government is not bound to abide by the settlement." (Record, pp. 24, 25.)

VII.

It is further claimed by counsel for plaintiff in error, that the court below erred in refusing the 11th and 14th instructions above enumerated, viz: That "even if the jury find that the defendant was guilty of fraudulent disclosures or concealments in his negotiations with the plaintiffs, and thereby obtained the compromise in question, the plaintiff cannot recover in this action unless they find under the charge of the court that the whole $80,000 was especially paid to the defendant to pay to the plaintiff;" and "that there is no evidence tending to show that any specific portion of the $80,000, except the $35,000, was paid to the defendant to be paid to the plaintiff."

The first of these instructions states what is clearly not law. It was not essential to a recovery in the action that the jury should find that the whole $80,000 was paid to the defendant to pay to the plaintiff. It was

sufficient for that purpose if they found that some portion of that amount, exceeding the sum of $35,000, had been so paid, as a recovery could be had *pro tanto*. The charge of the court on this subject was correct: "The Government can recover in this action for money had and received only when it is established that the $80,000, or some portion of it over the $35,000 already paid, was paid defendant for the United States."

The other instruction would be equivalent to saying to the jury: "There is evidence tending to show that the $35,000 was a specific portion of the $80,000, and was paid to the defendant to be paid to the plaintiff, while there is no evidence tending to show that any other specific portion of the $80,000 was so paid." This statement would have been clearly improper, for the reason that it asserts what is not true in point of fact; there being no evidence whatever which shows or tends to show that the $35,000 was specifically paid to the defendant to be paid to the plaintiff. What the evidence does show is, that the sum of $80,000 was paid by the company to the defendant; and the court properly rejected the instruction asked, and left it to the jury to determine how much of that $80,000 was thus paid for the use of the plaintiff.

VIII.

It is also contended that the court below erred in refusing the 13th instruction above enumerated, viz: That "there is no evidence that tends to show that there

was a reasonable doubt whether the sureties upon said bonds had not been discharged from their liabilities thereon, and the statements made by defendant to the plaintiff that such doubts existed are not evidence of fraud." (See brief of counsel for plaintiff in error, p. 32.)

The remarks already made in connection with the 3d, 4th, and 5th instructions, (see under II above,) apply to the one just quoted. It was certainly unimportant to the issue, whether or not a reasonable doubt existed as to the sureties on the bonds having been discharged from their liabilities; and that being the case, any instruction respecting evidence as to the existence of such doubt, or respecting statements made by defendant to the plaintiff concerning the existence of such doubt, was clearly irrelevant.

Of the same character exactly is the 2d instruction, which was refused by the court below, viz: "That the provision in the mortgage in trust, of 1860, is simply a covenant upon the part of the trustees to apply the earnings of said road, in a certain contingency, to the payment of this, [the indebtedness on the bonds,] together with other indebtedness of the railway company." Counsel for plaintiff in error, in their brief, have apparently passed over the refusal of this instruction, regarding it, perhaps, as unimportant; and it is very clear that, as the construction of the instrument referred to therein did not in any manner become involved, such refusal furnished no ground for objection.

IX.

We have, thus far, examined each of the specific instructions asked in behalf of the defendant below, and refused, and we fail to discover any error in the rulings of the court below respecting any one of them. The exceptions thereto, as has been already intimated, comprise the only exceptions presented in the bill of exceptions which can be regarded as properly bringing up any question of law for revision here; and hence, if our conclusions with regard to the instructions mentioned are correct, we think the judgment should be sustained.

But, in addition to the foregoing, there is this other consideration to be taken into view, viz: that it was not error for the court below to refuse to give the instructions asked for by the defendant, even if correct in point of law, provided those given covered the entire case, and submitted it properly to the jury.

Labor *vs.* Cooper, 7 Wall., 571.

Law *vs.* Cross, 1 Black, 533.

Clymer *vs.* Dawkins, 3 How., 688.

The specific instructions asked in this case are numerous, and, being directed only to isolated facts or parts of the evidence, were calculated to embarrass and mislead, rather than to aid and enlighten the jury. They were applicable, if at all, merely to detached fragments of the case, and served but to complicate it. Such being their character and tendency, it was not only the right but the duty of the court to reject them.

On the other hand, the instructions given by the court cover the whole ground of the controversy, and fairly and correctly present and illustrate the principles of law involved therein.

X.

For reasons already suggested, we do not feel called upon to answer objections which are not predicated upon the special exceptions taken by the defendant to the refusal of the instructions asked for by him.

There is, however, a point raised by the counsel on the opposite side, in their brief, which is based on the charge of the court, and which we will also examine. The point is this: That "under the circumstances of the case, the charge of the court that 'the action for money had and received is an equitable action, and under this form of action the plaintiff may recover for any money which defendant has, that in equity and good conscience the Government is entitled to demand,' was calculated to mislead the jury, and was, therefore, erroneous even if abstractly correct." (See brief of counsel for plaintiff in error, p. 34.)

The subject of the charge thus made by the court is the *nature and scope of the action* brought by the plaintiff against the defendant; and granting that the charge itself is abstractly correct as a legal proposition, with what propriety can it be regarded as calculated to mislead the jury upon the subject mentioned? If not upon that subject, then certainly not upon any other; for we

are not at liberty to presume that the jury understood it as instructing them in reference to, or leaving them to form impressions concerning, matters to which it does not directly relate.

The correctness of the instruction, in point of law, is unquestionable: for where one man has in his hands money, which, according to the rules of equity and good conscience, belongs to and ought to be paid to another, it may be recovered in the action for money had and received.

Wiseman *vs.* Lyman, 7 Mass., 288.

The *gist* of this kind of action is, that the defendant, upon the circumstances of the case, is obliged, by the ties of natural justice and equity, to pay over the money.

Lockwood *vs.* Kelsea, 41 N. H., 188.

So that if it appears, from the whole case, that the defendant has in his hands money which, according to rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover; and, as a general rule, where money has been received by a defendant under any state of facts which would, in a court of equity, entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action.

Moore *vs.* Mandlebaum, 8 Mich., 448.

Whether there were circumstances in this case which went to prove that the defendant had received any, and, if any, what amount of funds, which, *ex æquo et bono*, he

ought to have paid over to the plaintiff, was a matter for the jury to determine upon the evidence. We may be permitted to observe, however, that it is established that the plaintiff had a claim against the company, which the latter acknowledged upon their books and gave a deed of trust to secure, but that the amount thereof was in dispute. The defendant, assuming the office of an intermediate negotiator, obtained a proposition for a compromise of this claim from the company, in which a definite amount was named. Thereupon he went to the plaintiff's attorney, and not only carefully withheld any information respecting the company's proposition, but made such statements as would naturally induce the attorney to believe that no such proposition had in fact been made, that there were grave doubts both as to the liability of the company and as to its solvency, and that, at least, the claim would probably be contested by the company unless a very great abatement in the amount was made. He then made an offer of less than one-half the sum named by the company. Subsequently, and before the acceptance of this offer, the defendant received from the company the amount named in their proposition. This fact he also concealed; and the plaintiff afterwards, in ignorance of the *proposition* of the company and also of the *payment* by the company, accepted the offer made by the defendant and compromised the claim against the company. Thus the defendant, by a wilful and industrious concealment of material facts, made in order to keep the plaintiff in ignorance and to

profit by that ignorance, managed to pocket a large sum of money, which, it is submitted, in equity and good conscience belonged to the plaintiff.

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